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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITIBANK, N.A.,

Petitioner,

v.

WELLS FARGO ASIA LIMITED,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in the absence of an agreement to the contrary, federal law precludes the imposition of liability on a United States bank for deposits made with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

RULE 29.1 STATEMENT

Citibank is a wholly-owned subsidiary of Citicorp. The only subsidiaries or affiliates of Citibank whose stock may be publicly held are: Ambac, Inc., Delaware; Banco Honduras, S.A.; Central Holdings Corp.; Citibank Budapest, RT; Citibank Espana, S.A.; Citibank Italia, S.P.A.; Citibank Portugal, S.A.; City Trust Banking Corp.; Companie Generale de Banque Citibank; Famibank, S.A.; Fuyo General Lease Co., Ltd.; Citibank Privatkunden A.G.; Saudi American Bank; Taiwan First Investment & Trust Co., Ltd.; and the United Bank of Trinidad and Tobago Limited.

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PETITION FOR A WRIT OF CERTIORARI

Citibank, N.A. ("Citibank"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court is reported at 936 F.2d 723 (attached hereto as Appendix A). The previous opinion of this Court is reported at 110 S. Ct. 2034 (attached hereto as Appendix B). The previous opinion of the court of appeals, which was reversed by this Court, is reported at 852 F.2d 657 (attached hereto as Appendix C). The second opinion of the district court on the merits is reported at 695 F. Supp. 1450 (attached hereto as Appendix E). The order of the court of appeals directing a limited remand is unreported (attached hereto as Appendix F). The first

opinion of the district court on the merits is reported at 660 F. Supp. 946 (attached hereto as Appendix G). The opinion of the district court denying respondent's motion for summary judgment is reported at 612 F. Supp. 351 (attached hereto as Appendix H).

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1991. On September 12, 1991, Justice Marshall granted an extension of time to and including October 24, 1991, within which to file a petition for certiorari. (Attached hereto as Appendix P.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted at Appendices I-O.

STATEMENT

U.S. banks have 819 foreign branches in 71 different countries with current outstanding deposit obligations of $300 billion.[1] In times of political or economic difficulty, foreign governments frequently prevent these branches of U.S. banks from repaying their depositors—for example, by imposing restrictions on payments by the branch or by taking the branch's assets. The issue presented in this case is whether the risk of this foreign sovereign interference with repayment (*i.e.*, "sovereign risk") is borne by the depositor who chooses to place funds in the foreign branch or by the bank in the United States. This recurring question of federal law has vital consequences for the United States banking system.

The position of the United States government is that foreign branch depositors assume the risk that the "foreign

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[1] Board of Governors of the Federal Reserve System, *77th Annual Report* 199 (1990); 77 Fed. Res. Bull. A56 (Sept. 1991) (excluding transactions among affiliates).

country in which a branch is located might impose restrictions on withdrawals." [2] This basic federal allocation of sovereign risk may be varied by private agreement, as occurs when a U.S. bank issues a guaranty of a deposit in a foreign branch, *see* 12 C.F.R. § 204.128(c) (1991) (App. N), but this is quite unusual. Among the many transactions in which there is no agreement to alter the allocation of sovereign risk are those in the international interbank placement market. Here, sophisticated financial institutions move hundreds of billions of dollars daily around the globe in search of optimal returns based on oral agreements followed with limited documentation.

This case arose out of just such an interbank transaction: a Singapore bank placed two $1-million deposits in Citibank's Manila branch and the Philippine government subsequently prevented the branch from repaying. In 1988, after district court proceedings, the court of appeals held that Citibank had agreed to bear the risk of the Philippine government interference. This Court granted certiorari and reversed on the ground that the parties had not reached any such agreement. *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 110 S. Ct. 2034 (1990) (App. B). The Court then concluded that it was premature to consider the issues of federal law raised by Citibank and the U.S. government until the court of appeals itself had determined on remand what law applied to the dispute and the content of that law.

On remand, the United States said that federal law governs the allocation of sovereign risk and imposes that risk upon foreign branch depositors. There, the Solicitor General, speaking for the banking agencies and the Departments of State and the Treasury, stated that federal

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[2] 12 C.F.R. § 204.128(c) (1991) (attached hereto as Appendix N at 88a-89a). *See* Brief for the United States as *Amicus Curiae* at 21, *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 936 F.2d 723 (2d Cir. 1991) (No. 87-7685) ("U.S. 2d Cir. Am. Br. II").

law provides "that United States banks are not liable for foreign sovereign action preventing repayment of foreign branch deposits," [3] and that a contrary rule would "impair specific congressional objectives" because it would "reduce the competitiveness of United States banks, threaten the government's mechanisms for assuring bank safety, and encourage foreign expropriations." [4]

The court of appeals rejected the U.S. government's position. It held instead that New York law placed the risk of foreign sovereign interference on the U.S. banking system and that no principle of federal law placed that risk on the depositor. The court of appeals' decision inflicts the same damage on the U.S. banking system that warranted this Court's initial grant of certiorari. This time, however, the issue of federal law is squarely presented and is ripe for this Court's review.

The Interbank Eurodollar Market and the Federal Regulatory System

For nearly a century, U.S. banks have actively participated in foreign banking markets through branch offices. They have done so pursuant to a congressional mandate, first laid out in the Federal Reserve Act of 1913,[5] for expanding this Nation's international commerce and furthering the interests of the United States abroad. These

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[3] U.S. 2d Cir. Am. Br. II, at 21.

[4] *Id.* at 26.

[5] Ch. 6, 38 Stat. 251 (current version, as amended, at 12 U.S.C. §§ 601-632 (1988)). Foreign branches were authorized to promote "the furtherance of the foreign commerce of the United States." 12 U.S.C. § 601 (1988) (attached hereto as Appendix J). The legislative history of the 1913 Act declared that foreign branching was necessary to permit "better extension of American banking facilities in foreign countries to the end that our trade abroad may be enlarged and that American business men [sic] in foreign countries may obtain the accommodations they require in the conduct of their operations." H.R. Rep. No. 69, 63d Cong., 1st Sess. 16 (1913).

foreign branches of U.S. banks operate as part of foreign banking systems: they are licensed by foreign governments, they typically obtain funds for their operations by taking deposits from local nationals, as well as others, and they lend funds in the foreign country. The foreign branches are subject to the regulatory, legal and monetary constraints of the foreign nation in which they operate.

Foreign branches obtain significant funds in the "interbank placement market." Today, the placements in this market amount to $2.6 trillion [6] and are a major international source of credit in which hundreds of billions of dollars change hands daily on a "bid and asked" basis (much like a commodities or securities exchange) as sophisticated financial institutions seek to maximize returns by placing funds in accounts or instruments throughout the world. These transactions are largely non-documentary, and the parties do not use the detailed written agreements typically found in other kinds of international business transactions. Instead, financial institutions conclude deposit agreements (either directly or through brokers) in brief international telephone calls that are later confirmed by cursory telexes (if at all).

Large amounts of interbank and foreign deposit transactions involve "Eurodollars." Eurodollars are U.S. dollars that are held on deposit in a financial institution abroad and that are collectible only outside the United States.[7] The Eurodollar market has grown significantly over the past 40 years because of the usefulness of Euro-

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[6] *See* Bank for International Settlements, *International Banking and Financial Market Developments* 63 tbl. 7 (August 1991).

[7] *See* Marcia Stigum, *The Money Market* 199, 1215 (3d ed. 1990); Peter K. Oppenheim, *International Banking* 261 (6th ed. 1991); Stuart W. Robinson, Jr., *Multinational Banking* 162 (1972); Milton Friedman, *The Eurodollar Market: Some First Principles, in The Eurodollar*, 272, 275 (Herbert V. Prochnow ed. 1970); Henry Harfield, *International Money Management: The Eurodollar*, 89 Banking L.J. 579, 585 (1972).

dollars as an international medium of payment.[8] Among other things, the Eurodollar market has established the U.S. dollar as a universal currency.

The Eurodollar market is the product of a fundamental distinction drawn by our federal banking statutes and regulations between domestic deposits and foreign deposits.[9] Domestic deposits receive the protections of the U.S. banking system, but are subject to attendant U.S. regulatory costs—including reserve requirements, federal deposit insurance assessments, and other burdens.[10] A fundamentally different regulatory regime applies to foreign branch deposits. These deposits are payable only abroad and are exempt from many of the costs of the U.S. banking system, including reserve requirements and federal deposit insurance assessments and, of course, are not protected by the federal safety net. Eurodollar deposits carry interest at rates that are independent of (and generally higher than) those paid on domestic dollar deposits.

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[8] U.S. companies use Eurodollars in their foreign operations, and non-U.S. entities use Eurodollars for a variety of purposes, including as payment for goods and services whose prices are denominated in dollars. *See* Oppenheim, *supra* at 262-63.

[9] *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner at 11, *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 110 S. Ct. 2034 (1990) (No. 88-1260) ("U.S. S. Ct. Am. Br.") ("The Eurodollar market exists in large part because the United States banking regulations give special treatment, in the form of exemptions from federal reserve requirements and insurance assessments, to dollar-denominated deposits that are legally payable only outside the United States."); U.S. 2d Cir. Am. Br. II, at 4 ("[T]he federal government has drawn distinctions between a United States bank's foreign and domestic deposits" and these distinctions "are critical to the federal regulatory scheme.").

[10] The differing regulatory system applicable to foreign and domestic deposits is discussed more fully at pp. 11-14, *infra*.

The Transactions in This Case

Respondent Wells Fargo Asia Limited ("WFAL/Singapore") is a Singapore bank that is a wholly-owned subsidiary of Wells Fargo Bank, N.A. In June 1983, WFAL/Singapore made two $1-million Eurodollar deposits with Citibank's Manila branch ("Citibank/Manila") through a Singapore money broker. The broker entered into oral agreements by telephone with representatives of Citibank/Manila specifying an interest rate of 10% and repayment in December 1983. WFAL/Singapore, its broker, and Citibank/Manila subsequently confirmed the interest rate and repayment date in telex messages. The telexes were silent as to the place of collection of the deposits, but contained routine instructions that repayment of the deposits would be routed through U.S. dollar accounts held in New York. (App. B at 21a-22a.) The 10% interest rate paid on WFAL/Singapore's Eurodollar deposits with Citibank/Manila was substantially higher than the 8.85% interest rate then payable on comparable deposits in New York. (App. H at 65a.)

As its financial and political crisis deepened, the Philippine government in late 1983 took drastic action to halt a precipitous decline in its foreign exchange reserves and to stabilize local economic conditions.[11] Among the steps taken was the promulgation of an order by the Philippine Central Bank prohibiting all Philippine banks—including Philippine branches of foreign banks—from repaying the principal of outstanding foreign currency obligations. This order, commonly referred to as MAAB 47, was supplemented by additional Philippine regulatory measures to conserve foreign currency and, later, to implement rescheduling of foreign debt. These measures applied to the millions in Eurodollar deposits held by Citibank/Manila, including the two WFAL/Singapore Eurodollar deposits.

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[11] *See* The World Bank, *1984 Annual Report* 93 (1984).

Citibank/Manila petitioned the Philippine government for a waiver of the restrictions imposed by MAAB 47 on the $600 million of deposits it then owed. The Philippine government ultimately denied the waiver, except to permit use of Citibank/Manila's dollar funds outside of the Philippines to repay the dollar deposits. (App. E at 46a-47a.) This enabled Citibank/Manila to repay almost half of the money it owed to its various dollar depositors, including $934,000 of the principal owed to WFAL/Singapore; payment of the remaining balances of WFAL/Singapore's deposits by Citibank/Manila is still prevented by Philippine law. For the entire period at issue here, while repayment of the principal was blocked by Philippine law, the law has permitted Citibank/Manila to make interest payments in dollars to its depositors—including WFAL/Singapore—and these interest payments have been made.

When Citibank/Manila was not permitted to pay the remaining $1,066,000 principal balance, WFAL/Singapore demanded collection from the U.S. bank assets of Citibank in New York. Citibank responded that the depositor had chosen to assume the risk of Philippine government interference and the deposits were collectible only from Citibank/Manila's assets.

The Proceedings in This Case

In 1984, WFAL/Singapore brought this action under 12 U.S.C. § 632 (1988) (attached hereto as Appendix K) and 28 U.S.C. § 1332(a) (1988) against Citibank in the United States District Court for the Southern District of New York to recover the remaining principal of the deposits it had placed with Citibank/Manila. After a bench trial and an initial appeal that resulted in a remand, the district court held that New York law imposed sovereign risk on the U.S. bank, and not the depositor, and therefore permitted the depositor to collect from the bank's U.S. assets.[12] The court of appeals affirmed

[12] The court's decision was based on its holding that Citibank had to permit collection from its U.S. assets unless it could prove such

on a different ground. It held that the sovereign risk rested on the U.S. banking system because the parties had an agreement to route payment through New York, which, the court concluded, carried with it an understanding that the depositor was entitled to collect its deposits there. (App. C at 33a-34a.)

This Court granted certiorari and reversed. It held that the agreement as to where repayment could occur did not constitute "an agreement as to which bank assets the depositor could look to for collection." (App. B at 19a-20a.)[13] The Court vacated the court of appeals' judgment and remanded the case with instructions that the court of appeals determine what happens in the absence of an agreement concerning collection, *i.e.*, whether "there is a duty to pay in New York . . . that the law creates when the parties have not contracted otherwise." (App. B at 19a.) The Court directed the court of appeals to determine whether federal, Philippine or New York law "applies, and the content of that law." (App. B at 24a.) The Court found it "premature to consider" whether federal law controlled because that issue should first be addressed by the court of appeals "subject to any further review we deem appropriate." (App. B at 24a.)

On remand, the Solicitor General took the unusual step of appearing in the court of appeals. The Solicitor General, speaking for all the banking agencies and the

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collection was legally "impossible" under New York law. Although the court found that Citibank had demonstrated that further collection from Citibank/Manila's assets was impossible, it held that, because Citibank had not sought Philippine government approval to use its U.S. assets to repay the blocked deposits, it could not demonstrate that collection from its U.S. assets was impossible. (App. E at 47a.)

[13] Accordingly, the Court concluded that the court of appeals' holding "contradicts the express finding of the District Court" that there was no agreement about collection. (App. B at 21a.)

Departments of State and the Treasury, asserted that federal law provides the rule of decision in this case and that it has long been clear under this federal rule that the depositor bears the sovereign risk in the absence of an agreement allocating that risk to a U.S. bank.

The court of appeals disagreed. It held: first, that New York law governs; second, that New York law imposes sovereign risk on a U.S. bank that agrees to route repayment through New York; [14] and third, that there is no federal principle that allocates the sovereign risk to the foreign depositor. (App. A 9a-10a.) The court of appeals neither discussed nor distinguished the position of the United States. Instead, it relied, *sua sponte*, on a clause in an emergency regulation that no banking agency or party had ever thought relevant to this case—a regulation dealing with sham treatment of small deposit accounts of U.S. residents in the United States.

REASONS FOR GRANTING THE PETITION

The court of appeals' reading of federal banking law is in direct conflict with the position taken by the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, and the Departments of State and the Treasury. If allowed to stand, the decision below would expose the U.S. banking system to new risks from the actions of foreign governments. It would effectively convert the majority of foreign branch deposits into U.S. deposits, thereby interfering with the longstanding scheme of federal bank regulation, creating risks affecting the safety and soundness of the U.S. banking system, and disrupting the international Eurodollar market. It also would undermine the competitiveness of U.S. banks abroad and allow foreign sovereigns to determine the risks to be borne in this country.

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[14] As it had done in its earlier decision, the court of appeals equated "repayment" with "collection." The court cited no New York (or other) authority for this proposition.

As the Solicitor General explained in the prior proceedings in this Court, federal law requires that:

> "[a] customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." 12 C.F.R. [§] 204.128(c). The repudiation of that premise would require a fundamental reassessment of domestic reserve requirements, insurance assessments, and the federal government's exemption for deposits payable only abroad. It would also frustrate important federal policies relating to the encouragement of this nation's foreign commerce and the protection of the safety and soundness of the United States banking system.

U.S. S. Ct. Am. Br. at 12-13. Because of the fundamental importance to our banking system of the result erroneously reached by the court of appeals, this Court should grant review.

I. FEDERAL LAW REQUIRES THAT DEPOSITORS IN A FOREIGN BRANCH OF A U.S. BANK BEAR THE RISK THAT THE FOREIGN GOVERNMENT WILL INTERFERE WITH REPAYMENT OF THEIR DEPOSITS.

Congress and the Federal Reserve Board have long promoted foreign branching by U.S. banks. They have done so to further the foreign commerce of the United States and to facilitate the overseas activities of the U.S. government. *See supra* pp. 4-6; U.S. S. Ct. Am. Br. at 1. At the same time, however, Congress and the Board have sought to protect the domestic banking system by insulating it from the adverse consequences of foreign actions.[15]

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[15] As early as 1918, the Federal Reserve Board took steps to insulate the domestic U.S. banking system and "the interests of the parent bank" from the risks flowing from the exposure of foreign branches of U.S. banks to "the laws of various sovereignties."

To accomplish these dual objectives, Congress and the Board have consistently drawn a fundamental distinction between the regulation of U.S. banks and the regulation of their foreign branches. The foundation of this distinction is the basic principle of federal law that a foreign branch depositor rather than the U.S. bank assumes the risk that the foreign government will interfere with repayment of a deposit. This principle has long been the basis for federal banking regulation: "For more than 70 years, federal bank regulatory agencies have relied on the principle that foreign deposits are payable only abroad." [16] Congress has specifically stated its intention to preserve this principle.[17]

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4 Fed. Res. Bull. 1123 (1918). Moreover, since its inception, the Federal Reserve Act has provided that U.S. banks "shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office." 12 U.S.C. § 604 (1988).

[16] U.S. 2d Cir. Am. Br. II, at 28. The Federal Reserve Board has made this principle explicit in its regulations. *See* 12 C.F.R. § 204.128(c) (App. N at 88a-89a) ("A customer who makes a deposit that is payable solely at a foreign branch of the depository institution *assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals.*" (emphasis supplied)). This principle also has been reflected in numerous actions of the Federal Reserve Board and Congress. *See* 4 Fed. Res. Bull. 1123 (1918); Banking Act of 1933, ch. 89, § 8, 48 Stat. 162, 176 (FDIC insurance does not extend to foreign branch deposits); *id.*, § 11(b), 48 Stat. at 181 (interest rate ceilings not applicable to foreign branch deposits); 35 Fed. Reg. 2,768 (1970) (reserve requirements not applicable to foreign branch deposits); 1 Fed. Res. Reg. Serv. at ¶ 2-330 (Staff Op., Feb. 23, 1982) (same); *id.* at ¶ 2-330.01 (Staff Op., Mar. 21, 1983) (same); *id.* at ¶ 2-330.1 (Staff Op., July 29, 1983) (same).

[17] 12 U.S.C. § 461(b)(6) (1988) (attached hereto as Appendix I at 79a). *See* H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979) ("[E]xpress . . . intent of the legislation [is] not to disturb the classifications as between domestic and foreign deposits which have been developed under existing law.").

The federal allocation of sovereign risk is central to the federal bank regulatory regime.[18] Domestic deposits are subject to reserve requirements, but foreign branch deposits are excluded from this levy.[19] Domestic deposits are covered by the federal deposit insurance program and are included in the assessments that banks pay for FDIC insurance; but foreign branch deposits are subject neither to the federal deposit insurance assessments nor the insurance protections of the FDIC program.[20] Domestic deposits have been subject to special controls for domestic economic or political policy, such as federal interest rate limits, but foreign branch deposits are not subject to these controls.[21] As the United States declared below: "[A] deposit placed with a foreign branch is payable only abroad (and therefore exempt from reserve requirements and insurance assessments) unless the parties have entered into a contrary written agreement." [22]

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[18] An exception to this general principle applies where there is an express agreement that places sovereign risk on the U.S. bank. Because such a foreign branch deposit is not considered as "payable only abroad," it is treated identically to a deposit in a domestic office of the U.S. bank.

[19] *See* App. I at 79a (reserve requirements do not apply to "deposits payable only outside" the United States); 4 Fed. Res. Bull. 1123 (1918); 12 C.F.R. § 204.1(c)(5) (1991) (Federal Reserve regulation promulgated in 1980 to implement statutory reserve requirements; requirements "do not apply to any deposit that is payable only at an office located outside the United States"); 35 Fed. Reg. 2,768 (1970).

[20] 12 U.S.C. § 1813(*l*)(5)(A) (1988 & Supp. I 1989) (attached hereto as Appendix L at 85a-86a) (deposits "payable only at an office . . . outside" of the United States not covered by FDIC insurance program).

[21] *E.g.*, 12 C.F.R. § 217.1(c)(2) (1991).

[22] U.S. 2d Cir. Am. Br. II, at 26-27. *See also id.* at 19-20 ("WFAL's deposits, like all Eurodollar deposits, are clearly subject to the federal reserve and deposit insurance exemptions . . . because they . . . are legally 'payable only' at the foreign branch."); *id.* at 21 ("Congress and the federal regulatory agencies have recognized

Thus, the U.S. banking system and federal safety net provide domestic depositors with a unique level of security—but at interest rates that reflect the costs of that security and the market here. In contrast, depositors in foreign branches of U.S. banks obtain what the foreign banking system offers—including different (and often, as here, considerably higher) interest rates, different markets and regulatory protections, and differing degrees of sovereign risk. The court of appeals' decision in this case destroys the distinction between domestic and foreign deposits, giving depositors like WFAL/Singapore an unauthorized deposit and the best of all worlds: the safety of the U.S. banking system and the interest rates available in foreign markets. As the U.S. government has made clear, this radical reworking of settled federal banking law and regulatory practice "would require a fundamental reassessment of domestic reserve requirements, insurance assessments, and the federal government's exemption for deposits payable only abroad." U.S. S. Ct. Am. Br. at 12-13.

The court of appeals held that New York law applied and that under New York law a U.S. bank bears the sovereign risk unless the foreign depositor has explicitly agreed otherwise. This, of course, is precisely the opposite of the federal rule. Nevertheless, the court of appeals announced that the New York rule was, in fact, consistent with the federal rule, because in the court's view, federal law contains neither a rule nor "a policy allocating [sovereign] risk to depositors as a matter of law." (App. A at 10a.)[23] The court based this conclusion solely on

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. . . that foreign deposits, such as WFAL's Eurodollar deposits with Citibank/Manila, are payable only at the place of deposit . . . .").

[23] Instead, the Second Circuit reasoned, federal law merely guarantees "a bank's freedom to enter into an agreement that allocates the risk of foreign sovereign restrictions." (App. A at 10a.) Although the court of appeals' decision leaves the parties free to shift

its interpretation of 12 C.F.R. § 204.2(t)—a provision to which no significance had ever been assigned in this case until the court's *sua sponte* action on remand.[24]

Section 204.2(t)[25] provides that, to be considered a foreign deposit, the depositor must be "entitled, under the agreement with the institution, to demand payment only outside the United States." 12 C.F.R. § 204.2(t) (1991) (attached hereto as Appendix M at 87a).[26] The court of appeals read that clause of 204.2(t) to mean that

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sovereign risk by contract, that is not the issue framed by the Court, nor is it the issue here. The very question in this case that this Court designated is the legal rule that applies when the parties have *not* entered into an agreement allocating sovereign risk.

[24] WFAL/Singapore itself had no illusions that Section 204.2(t) was of any special importance. In its brief to this Court it stated that "the [Federal Reserve] Board's Regulation D simply paraphrases the [Federal Reserve] Act's words about 'deposits payable only outside the United States,' 12 C.F.R. § 204.2(t)." Brief for Respondent at 37, *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 110 S. Ct. 2034 (1990) (No. 88-1260).

[25] Section 204.2(t) provides:

> "Any deposit that is payable only at an office located outside the United States" means (1) a deposit of a United States resident * that is in a denomination of $100,000 or more, and as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States or (2) a deposit of a person who is not a United States resident * as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States.
>
> * A deposit of a foreign branch, office, subsidiary, affiliate or other foreign establishment ("foreign affiliate") controlled by one or more domestic corporations is not regarded as a deposit of a United States resident if the funds serve a purpose in connection with its foreign or international business or that of other foreign affiliates of the controlling domestic corporation(s).

[26] The purpose of 204.2(t) was to set forth a *per se* rule that deposits under $100,000 of U.S. residents could not qualify as for-

a deposit meets the requirement that it be payable "outside the United States" only if the depositor's agreement with the bank contains a specific written provision that the depositor can demand payment only outside the United States. (App. A at 9a-10a.) This is not what the regulation says or means.

First, Section 204.2(t) was promulgated on an emergency basis to address arrangements involving small customer deposits where the agreements in question *did* contain clauses stating that the deposits were payable only abroad. 46 Fed. Reg. 27,090 (1981) (attached hereto as Appendix O). The Federal Reserve Board issued its regulation so that such clauses could not shield what, pursuant to the real nature of the deposit agreements, were effectively domestic deposits designed to evade domestic reserve requirements and interest ceilings. (App. O at 91a-92a.) That is why Section 204.2(t)'s text and statement of basis and purpose (to which the court of appeals did not refer) require that, to determine whether a deposit is payable outside the United States, one must look to the real nature of the deposit agreement between the parties and *not* to the absence or presence of any talismanic language. (App. O.) Thus, Section 204.2(t)'s text and purposes are directly contrary to the court of appeals' finding that a specific provision disclaiming sovereign risk is a *sine qua non* for a deposit payable solely abroad.

Second, Section 204.2(t) was concerned with small deposits of U.S. residents that, on their face, were payable only abroad but were effectively U.S. domestic deposits. Thus, Section 204.2(t), the objective of which was to proscribe such sham transactions, has no bearing on the

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eign deposits. The language cited in the text—applicable to both deposits of U.S. and foreign residents—was, as noted by WFAL/Singapore, *see supra* note 23, meant to restate the general statutory requirement.

deposits in this case—*bona fide* Eurodollar deposits that do not contain provisions allocating sovereign risk.[27] Nor does it reflect any intention to affect any other interpretation of the Federal Reserve Board's reserve or interest-rate requirements, and certainly not to vary the long-standing rule placing sovereign risk on *bona fide* foreign branch depositors.[28]

Third, the lower court's interpretation ignores the Federal Reserve Board's expert interpretation of its own regulations with which the other bank regulators concur. As the Solicitor General has made clear, the Board has long understood 12 C.F.R. § 204.128 to provide that sovereign risk is borne by foreign branch depositors. *See supra* pp. 11-13. Indeed, Section 204.128(c) further provides that sovereign risk shifts to the U.S. bank when the U.S. bank expressly guarantees collection from its U.S. assets.[29] It would have made no sense for the Board to issue a regulation placing sovereign risk on a U.S. bank that guarantees foreign branch deposits, if the U.S. bank were liable for foreign branch deposits even without such a guarantee.

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[27] No allegation has been (or could be) made that WFAL/Singapore's deposits were not *bona fide* foreign deposits. In promulgating Section 204.2(t), the Federal Reserve Board noted that preventing the particular abusive arrangement involving U.S.-resident deposits of less than $100,000 did not implicate the concerns for the international competitiveness of U.S. banks that underlay the exemption from reserve requirements for deposits payable solely abroad. (App. O at 91a-92a.).

[28] Indeed, when the federal government first announced the basic principle that soversign risk rests on foreign branch depositors, Section 204.2(t) did not exist.

[29] When payment of a deposit in a foreign branch is guaranteed by a promise of payment at an office in the United States if not paid at the foreign office, the depositor no longer assumes [the sovereign] risk but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the depository institution.

(App. N at 89a.)

The court of appeals' entire approach to the interpretation of federal law is fundamentally flawed and demonstrates why the court should have given deference to the agencies' longstanding interpretation. The federal bank regulatory system is a complex array of interrelated and detailed provisions. Like other regulatory regimes, these provisions are informed by practice, history, and policy, as well as by their literal terms. It is a well-settled principle of administrative law that an agency's interpretation of the statutory scheme it administers is entitled to great weight. *See, e.g., FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986) (FDIC's "practice and belief" entitled to " 'considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' " (alteration in original) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984))); *Lyng v. Payne*, 476 U.S. 926, 939 (1986) (in particular, "agency's construction of its own regulations is entitled to substantial deference"); *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 142 (1984); *see also, e.g., United States v. Larionoff*, 431 U.S. 864, 872 (1977) ("In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

The Solicitor General's brief below expresses the joint position of the Federal Reserve Board and other federal bank regulators, and the Departments of the Treasury and State. This position presents a comprehensive and unified analysis of the regulatory structure that makes clear that the federal rule allocating sovereign risk to the depositor is an integral and longstanding element of the federal banking regime. The Second Circuit, disregarding the judgment of the expert agencies, struck out on its own, and elevated its own—and patently incorrect—view of a

single clause in a regulation, read in isolation, above the rest of the regulatory scheme.[30]

II. THE COURT OF APPEALS' REFUSAL TO GIVE EFFECT TO FEDERAL LAW WILL SEVERELY INJURE U.S. BANKS, THE FEDERAL BANK REGULATORY SYSTEM, THE EURODOLLAR MARKET, AND THE FEDERAL GOVERNMENT'S AUTHORITY OVER FOREIGN AFFAIRS AND COMMERCE.

The court of appeals' decision undermines the long-standing federal objectives that led to the federal rule that depositors in foreign branches of U.S. banks must bear the sovereign risk on their deposits.

First, imposing sovereign risk on U.S. banks would create significant disincentives to foreign branching and U.S. foreign commerce. Foreign governments have interfered with the ability of foreign branches of U.S. banks to repay their depositors with unfortunate frequency. This has occurred, for example, in the Soviet Union, China, Cuba, Vietnam, Panama, and—in this case—the Philippines.[31] The economic plight of heavily indebted

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[30] The court of appeals' opinion contains various out-of-context allusions (App. A at 4a, 9a, 11a) to the district court's finding that Citibank did not seek Philippine government approval to use its U.S. assets to repay the blocked Manila deposits. These allusions are irrelevant to the decision of this case. As this Court made clear in its reversal of the court of appeals' earlier decision, the issue in this case is not whether Philippine law "bar[s] the collection of WFAL's deposits from the general assets of the Citibank in the State of New York" but "rather, is whether Citibank is *obligated* to allow collection in New York." (App. B at 19a.) (emphasis supplied). Citibank may or may not be able to repay WFAL/Singapore's deposits with its New York assets with or without Philippine government approval; the issue in the case, however, is whether Citibank is *obligated* to do so under applicable law. Thus, observations about Citibank's refusal to seek permission to use its New York assets are simply unresponsive to this Court's remand order and beg the dispositive question.

[31] In recent years, U.S. banks have repeatedly been confronted with claims in U.S. courts that they must use their U.S. assets to

countries and political instability throughout the world increase this risk of adverse foreign sovereign action.

If U.S. banks bear home office liability for foreign deposits because of foreign governmental actions—which by definition are entirely beyond the control of the bank or even the U.S. government—foreign branch operations of U.S. banks will become the source of new, substantial, and unanticipated liabilities that their foreign competitors do not face.[32] Imposing home office liability for foreign branch deposits would, as the Solicitor General has explained, "place United States banks at a serious competitive disadvantage with respect to foreign banks" and "would impair the ability of United States banks to compete in the Eurodollar market." U.S. 2d Cir. Am. Br. II, at 24-25. If U.S. banks continue to use the interbank placement market, they will face increased costs or risks making it harder to offer competitive rates;

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repay deposits placed in their foreign branches. *E.g., Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 2602 (1990); *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988); *Perez v. Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y.), *cert. denied*, 469 U.S. 966 (1984); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984).

[32] Thus, for example, courts in England and France have ruled that banks in those countries will not be held liable in circumstances parallel to those presented here. *See, e.g., Joachimson v. Swiss Banking Corp.*, [1921] 3 K.B. 110, 127 (England); *Dame Ba Tu Thu Van v. Banque National de Paris*, Tribunal de grande instance de Paris, 9eme Chambre (Mar. 8, 1985), reported in Recueil Dalloz Sirey 500-501 (1985) (France), and *Dame Thi To Tam v. Banque Francaise Commerciale*, Tribunal de grande instance de Paris, 9eme Chambre (Mar. 12, 1985), reported in Recueil Dalloz Sirey 500-501 (1985) (France). *See also* U.S. S. Ct. Am. Br. at 15 n.11 (common law and civil law countries do not impose liability for sovereign risk on their banks' home offices); U.S. 2d Cir. Am. Br. II, at 33 n.21 (same).

alternatively, they may be compelled to seek funding elsewhere or shrink their business. The gravity of these consequences is underscored by the fact that U.S. banks hold almost $300,000,000,000 of deposits abroad, with Eurodollar interbank placements accounting for approximately 20% of the dollar deposits of foreign branches (and inevitably an even greater percentage of the short-term deposits necessary to maintain daily funds on hand).[33]

Second, allocating sovereign risk to U.S. banks disrupts the federal bank regulatory system. The U.S. bank regulatory system has provided domestic depositors with a high degree of security but at rates of return that reflect the cost of that security. In contrast, depositors in foreign branches of U.S. banks—including WFAL/Singapore here—have taken what the foreign market offered, including opportunities for higher returns subject to the political and economic risks present abroad. In effect, the court of appeals' decision creates a baseline rule that most current dollar deposits in foreign branches are payable in the United States, unless there has been some explicit disclaimer. This gives foreign depositors an unauthorized form of deposit that represents the best of both worlds: in the interbank placement market, for example, it gives the foreign depositor protection by the U.S. banking system for which no FDIC insurance payment or reserve provision has been made, and the higher rates of return generally available only in foreign countries because of the different risks and market environments abroad. As the Solicitor General told the court of appeals,

> [t]he imposition of home office liability could . . . ultimately expos[e] domestic creditors and the federal bank regulatory system to the consequences of foreign sovereign action . . . . [T]he federal deposit insurance program, which plays an important role

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[33] 77 Fed. Res. Bull. A56 (Sept. 1991) (excluding transactions among affiliates).

> in assuring the safety and soundness of the United States banking system, could face substantial new liabilities at a time when it is facing unprecedented demands on its limited insurance funds.

U.S. 2d Cir. Am. Br. II, at 25.

For much the same reasons, allocating foreign sovereign risk to U.S. banks also would frustrate important federal policies relating to the international Eurodollar market, that provides a global source of funds in a universally accepted currency for international businesses.[34] Eurodollar transactions are of critical importance to the efficient operation of international capital markets because they enable financial institutions to move large amounts of funds around the world and create an alternative to the interest rates and regulatory structure of the U.S. domestic system. As a consequence, the Eurodollar market has grown to enormous proportions. Congress and the Federal Reserve Board have encouraged the development of the Eurodollar market precisely by adopting the longstanding exemptions of deposits payable abroad from domestic banking regulatory requirements.[35] Uncertainty with respect to the continued application of these exemptions would impair the functioning of this market and the continued ability of U.S. banks' foreign branches to seek funding from Eurodollar deposits.[36]

Finally, the court of appeals' decision would increase the economic and political leverage of sovereigns against the United States and "invite unfriendly foreign governments to seize or encumber foreign branch assets because the cost[s] of such seizures would be borne by United States banks rather than by local depositors or

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[34] *See* Sir George Bolton, *Background and Emergence of the Eurodollar Market, in The Eurodollar* 2, 15 (Herbert V. Prochnow ed. 1970); Oppenheim, *supra* at 263-65; Robinson, *supra* at 288.

[35] *See* U.S. 2d Cir. Am. Br. II, at 17, 19-20.

[36] *See id.* at 24-25.

the foreign governments themselves." U.S. 2d Cir. Am. Br. II, at 25. Foreign governments exercise jurisdiction over the day-to-day operations of their financial institutions, including the foreign branches of U.S. banks (such as Citibank/Manila) located within their territory. Foreign governments use this power to implement monetary, political, and other governmental policies by measures such as exchange controls, debt moratoria, currency revaluations, and expropriatory actions. Holding U.S. banks responsible to foreign depositors for any loss resulting from such foreign government actions—which is what the court of appeals did—would expose U.S. banks (and the U.S. banking system) to substantial liability. The vulnerability of the U.S. banking system to such actions would create a new set of foreign policy problems for the United States.

III. UNDER THE DOCTRINES OF FEDERAL COMMON LAW AND PREEMPTION, THE FEDERAL RULE ALLOCATING SOVEREIGN RISK SUPERSEDES STATE AND FOREIGN LAW.

The allocation of sovereign risk to foreign branch depositors is a controlling rule of federal law that supersedes any inconsistent state law. This result follows from an application of either federal common law principles or the doctrine of preemption.

In determining whether a principle of federal common law is appropriate, this Court looks to whether the area involves a "uniquely federal interest" and whether "the application of state law would 'frustrate specific objectives' of federal legislation." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)). In addition, federal common law exists "where a uniform national rule is necessary to further the interests of the Federal Government." *Miree v. DeKalb County*, 433 U.S. 25, 29 (1977). This case plainly satisfies these tests for the application of federal common law.

First, this case arises at the intersection of two fields of uniquely federal concern—foreign commerce and foreign relations.[37] The United States forcefully made this point in the court of appeals: "there can be no doubt that this case raises uniquely federal concerns . . . [because] the federal government has unusually strong interests in this area . . . [of] foreign commerce and foreign relations." U.S. 2d Cir. Am. Br. II, at 23.

Second, the allocation of sovereign risk to foreign depositors is vital to specific federal policies and objectives. As the Solicitor General has demonstrated, ignoring this allocation would "frustrate important federal policies relating to the encouragement of this nation's foreign commerce and the protection of the safety and soundness of the United States banking system." [38] These policies, and the effects of the lower court's ruling, are described more fully above (pp. 11-14).

Third, both banks and bank regulators have a compelling need for a uniform national standard governing the allocation of sovereign risk. The Solicitor General has explained that "a uniform federal rule is necessary . . . [for] federal bank regulators." [39] The peculi-

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[37] This Court has long recognized the federal government's primacy in the areas of foreign commerce and foreign relations. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 (1979); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

[38] U.S. S. Ct. Am. Br. at 13.

[39] U.S. 2d Cir. Am. Br. II, at 27; *id.* ("It would be difficult for federal bank regulators to monitor compliance effectively in the absence of this clear, workable [federal] rule."). By relying on state law, the court of appeals' decision would not produce a uniform rule of sovereign risk allocation. Rather, rules of decision in similar cases would be supplied by different state, foreign, and federal law selected by applicable choice of law rules that would differ depending on the forum.

arly national character of this dispute is further reflected by 12 U.S.C. § 632 (1988) (App. K), which provides that suits involving federally chartered banks and relating to foreign banking "shall be deemed to arise under the laws of the United States." [40]

Finally, New York law as interpreted and applied by the court of appeals clearly "conflict[s] with federal policy." *Boyle*, 487 U.S. at 507. As described more fully above (pp. 11-14), New York law, as construed by the court of appeals, produces exactly the opposite allocation of sovereign risk as that required by federal law. Under settled principles of federal common law, the court of appeals' application of New York law cannot stand.

The doctrine of preemption also compels the conclusion that foreign depositors, rather than U.S. banks, must bear sovereign risk. As explained above, the federal rule governing risk allocation is embodied in numerous federal statutes and regulations and is incorporated in the federal banking system created by Congress and the Federal Reserve Board. Any local law that purports to hold U.S. banks liable for sovereign risk contrary to this federal rule is preempted because it "conflicts with federal law," *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988), and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As the Solicitor General argued below:

> The federal government's incorporation of that principle [allocating sovereign risk] establishes a federal rule of decision in this case. The federal program

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[40] As the Court has observed, a provision such as this can be "a proper basis for the development of judge-made rules." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 96 (1981). *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 467-68 (1942) (Jackson, J., concurring).

> for the promotion of foreign branch banking and the federal bank regulatory requirements depend on observance of the distinction between foreign and domestic deposits. The failure to observe this distinction could jeopardize federal interests in foreign relations and commerce and could disturb the manner in which the federal banking structure allocates risk[].

U.S. 2d Cir. Am. Br. II at 13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 24, 1991

APPENDICES

APPENDIX A

936 F.2d 723

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 87-7685

WELLS FARGO ASIA LIMITED,
Plaintiff-Appellee,
v.
CITIBANK, N.A.,
Defendant-Appellant.

Final Submissions
After Remand from
Supreme Court Feb. 19, 1991

June 26, 1991

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Kenneth V. Handal, New York City (Dennis G. Lyons, Robert H. Winter, Deborah S. Prutzman, David F. Freeman, Jr., Arnold & Porter, Christine E. Beatty, of counsel), for Bank of Montreal, Credit Du Nord, Maryland Nat. Bank, and the Toronto-Dominion Bank as Amici Curiae urging affirmance.

Before TIMBERS, KEARSE and MAHONEY, Circuit Judges.

KEARSE, Circuit Judge:

This action, brought by plaintiff Wells Fargo Asia Limited ("WFAL") to recover funds deposited with the Philippine branch of defendant Citibank, N.A. ("Citibank"), returns to us on remand from the United States Supreme Court, *see Citibank, N.A. v. Wells Fargo Asia Limited*, —— U.S. ——, 110 S. Ct. 2034, 109 L.Ed.2d 677 (1990), *vacating and remanding* 852 F.2d 657 (2d Cir. 1988), *aff'g* 660 F. Supp. 946 (S.D.N.Y. 1987), for a determination of what law applies to the present controversy and the content of that law, and for resolution of the controversy in light of those determinations. For the rea-

sons below, we affirm the district court's ruling that the law of New York is applicable and its award of judgment in favor of WFAL.

I. BACKGROUND

The background of this action has been recounted in several opinions, including *Citibank, N.A. v. Wells Fargo Asia Limited*, —— U.S. ——, 110 S. Ct. 2034, 109 L.Ed.2d 677 (*"WFAL IV"*); *Wells Fargo Asia Limited v. Citibank, N.A.*, 852 F.2d 657 (2d Cir. 1988) (*"WFAL III"*), *Wells Fargo Asia Limited v. Citibank, N.A.*, 695 F. Supp. 1450 (S.D.N.Y. 1988) (*"WFAL II"*), and *Wells Fargo Asia Limited v. Citibank, N.A.*, 660 F. Supp. 946 (S.D.N.Y. 1987) (*"WFAL I"*), familiarity with which is assumed. Briefly, in 1983, WFAL, a Singapore-chartered bank wholly owned by the United States-chartered Wells Fargo Bank, N.A., placed two six-month nonnegotiable U.S. $1,000,000 deposits with Citibank for its branch in Manila, Philippines ("Citibank/Manila"). The deposit agreement called for WFAL to pay this amount to Citibank in New York for deposit at Citibank/Manila; it called for Citibank to repay Wells Fargo International's New York account for WFAL.

The deposits were to mature in December 1983. In October 1983, however, the Philippine government issued a Memorandum to Authorized Agent Banks ("MAAB 47"). As described in our earlier opinion, MAAB 47 provided, in pertinent part, as follows:

> Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank [of the Philippines] thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.

> As interpreted by the Central Bank of the Philippines, this decree prevented Citibank/Manila, an "authorized agent bank" under Philippine law, from repaying the WFAL deposits with its Philippine assets, i.e., those assets not either deposited in banks elsewhere or invested in non-Philippine enterprises. Citibank/Manila did not repay WFAL's deposits upon maturity.

WFAL III, 852 F.2d at 659. After WFAL commenced the present suit for repayment of the deposited amounts, Citibank/Manila sought and received permission from the Central Bank of the Philippines to repay its foreign depositors to the extent it could do so with non-Philippine assets. Citibank/Manila thereafter repaid WFAL $934,000, leaving $1,066,000 in dispute.

The district court, Honorable Whitman Knapp, Judge entered judgment in favor of WFAL, rejecting Citibank's contention that MAAB 47 made it impossible to repay the WFAL deposits. Noting that MAAB 47 allows obligations to foreign banks to be repaid if the consent of the Central Bank is obtained, and further noting that Citibank had not satisfied its good faith obligation to seek that consent, the court concluded that Citibank's impossibility defense must fail. Though originally making this ruling on the hypothesis that the law of the Philippines applied, *see WFAL I*, 660 F. Supp. at 947, the district court concluded, upon request from this Court for clarification, that New York law, rather than Philippine law, governed the dispute, *WFAL II*, 695 F. Supp. at 1454. It ruled that under New York law, Citibank's worldwide assets were available for satisfaction of WFAL's claim. *Id.*

We affirmed. Though the district court had concluded (a) that repayment and collection are independent concepts, and (b) that the parties had not reached an agree-

ment as to the situs of collection, and we did not disturb those rulings, we concluded that the

> authorities suggest that a debt may be collected wherever it is repayable, *unless* the parties have agreed otherwise. Since the court found here that there was no separate agreement restricting where the deposits could be collected, and we are aware of nothing in the record that contradicts that finding, we conclude that WFAL was entitled to collect the deposits out of Citibank assets in New York.

WFAL III, 852 F.2d at 661 (emphasis added).

The Supreme Court vacated our decision, stating that we appeared to have treated the concepts of repayment and collection as interchangeable rather than independent and to have "rel[ied] upon the existence of an agreement between Citibank and WFAL to permit collection in New York." *WFAL IV*, 110 S. Ct. at 2040. The Supreme Court concluded that the district court's finding that there was no agreement as to the situs of collection was not clearly erroneous; it also endorsed "the District Court's conclusion that the parties, in this particular case, failed to establish a relevant custom or practice in the international banking community from which it could be inferred that the parties had a tacit understanding on the point." *Id.* at 2041. Concluding that our decision could not be upheld on the theory that there was an agreement as to the place of collection, the Supreme Court remanded for a determination of whether WFAL's claim is governed by New York law, Philippine law, or federal common law, and what the content of the governing law is, and directed us to decide the appeal in light of those determinations:

> Given the finding of the District Court that there was no agreement between the parties respecting collection from Citibank's general assets in New York,

> the question becomes whether collection is permitted nonetheless by rights and duties implied by law. As is its right, . . . WFAL seeks to defend the judgment below on the ground that, under principles of either New York or Philippine law, Citibank was obligated to make its general assets available for collection of WFAL's deposits . . . . It is unclear from the opinion of the Court of Appeals which law it found to be controlling; and we decide to remand the case for the Court of Appeals to determine which law applies, and the content of that law.

Id. at 2042.

Accordingly, we proceed to those questions.

II. DISCUSSION

In response to this Court's earlier inquiry, the district court discussed the choice-of-law question as follows:

> The legal principles governing our determination are straightforward. Jurisdiction in this action is asserted both on the basis of diversity and federal question involving 12 U.S.C. § 632. In diversity cases, of course, we must apply the conflict of law doctrine of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941) 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477. In federal question cases, we are directed to apply a federal common law choice of law rule to determine which jurisdiction's substantive law should apply. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.* (2d Cir. 1980) 629 F.2d 786, 794-95, *cert. denied* (1981) 449 U.S. 1080, 101 S. Ct. 863, 66 L.Ed.2d 804. The rule in New York is that "the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining

State interests are those which relate to the purpose of the particular law in conflict." *Intercontinental Planning, Ltd. v. Daystrom, Inc.* (1969) 24 N.Y.2d 372, 382, 300 N.Y.S.2d 817, 825, 248 N.E.2d 576, 582. Federal law invokes similar considerations, *see, Corporacion Venezolana*, 629 F.2d at 795, and the place of performance is considered an important factor. *Citibank, N.A. v. Benkoczy* (S.D. Fla. 1983) 561 F. Supp. 184, 186 and cases cited therein.

Regardless of whether the New York or federal test is used, application of these standards leads us to the conclusion that New York law should be used to evaluate Wells Fargo's contention that Citibank's worldwide assets are available for repayment of the deposits. As the New York Court of Appeals has recognized, "New York . . . is a financial capital of the world, serving as an international clearing house and market place for a plethora of international transactions . . . [.] In order to maintain its pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected." *J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.* (1975) 37 N.Y.2d 220, 227, 371 N.Y.S.2d 892, 898, 333 N.E.2d 168, 172. In our view, these expectations will be best promoted by applying a uniform rule of New York law where, as here, the transactions were denominated in United States dollars and settled through the parties' New York correspondent banks, and where the defendant is a United States bank with headquarters in New York. Since Eurodollar transactions denominated in U.S. dollars customarily are cleared in New York . . ., the rationale for application of New York law becomes even stronger. If the goal is to promote certainty in international financial markets, it makes sense to apply New York law uniformly, rather than

> conditioning the deposit obligations on the vagaries of local law, and requiring each player in the Eurodollar market to investigate the law of numerous foreign countries in order to ascertain which would limit repayment of deposits to the foreign branch's own assets.

WFAL II, 695 F. Supp. at 1453-54.

As to the content of New York law on the matter, the district court noted that the most recent pronouncement of the New York Court of Appeals, *see Perez v. Chase Manhattan National Bank, N.A.*, 61 N.Y.2d 460, 468, 474 N.Y.S.2d 689, 691, 463 N.E.2d 5, 7, *cert. denied*, 469 U.S. 966, 105 S. Ct. 366, 83 L.Ed.2d 302 (1984), indicated that the parent bank is ultimately liable for the obligations of the foreign branch. Though the district court reasoned that an actual expropriation by the foreign government would be treated differently, it concluded that in the present case, there having been no expropriation and no limitation of the depositor's rights but only action affecting the assets of the branch, New York law would allow collection of the debt in New York:

> [I]f the Philippines had confiscated plaintiff's deposits, New York courts would interpret the expropriation as a compulsory assignment of the depositor's rights, so that payment to the Philippine assignee would discharge the debt. A New York court would further recognize such compulsory assignment as an act of a foreign sovereign unreviewable under the Act of State doctrine. *Perez, supra*, 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5. We believe New York would take a similar approach in the situation where a foreign government had effected a partial confiscation in the form of a tax on a deposit made at a foreign branch. *See, Dunn v. Bank*

> *of Nova Scotia* (5th Cir. 1967) 374 F.2d 876. However, we are aware of no persuasive authority to tell us to what extent, if any, a New York court would defer to local law in the situation here presented, where the foreign sovereign did not extinguish the branch's debt either in whole or in part but merely conditioned repayment on the obtaining of approval from a government agency. Fortunately, we need not resolve that troublesome question.

WFAL II, 695 F. Supp. at 1454-55. The court found it unnecessary to determine whether New York law would hold that a foreign government's refusal to give the prerequisite consent constitutes an excuse for refusal to make repayment, in light of its earlier finding that Citibank "had not satisfied its good faith obligation to seek the [Philippine] government's consent to use the assets booked at Citibank's non-Philippine offices." *Id.* at 1455. The court reaffirmed that finding.

We agree with the district court's analysis, and we conclude, substantially for the reasons that court stated, that New York law governs the present claim and that under New York law, Citibank was not excused from making repayment. In urging that we reach the contrary conclusion, Citibank argues that there is a clear federal policy placing the risk of foreign-law impediments to repayment on the depositor. In so arguing, it relies on federal banking rules such as 12 U.S.C. § 461(b)(6) (1988), which provides that banking reserve requirements "shall not apply to deposits payable only outside the States of the United States and the District of Columbia," and 12 C.F.R. § 204.128(c) (1990) (issued at 52 Fed. Reg. 47696, Dec. 16, 1987), which provides that "[a] customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." Citibank's reliance on these provisions is

misplaced. Federal law defines a deposit that is "payable only at an office outside the United States" as "a deposit . . . as to which the depositor is entitled, *under the agreement with the institution*, to demand payment *only* outside the United States." *Id.* § 204.2(t) (emphasis added). The provisions relied on thus do not reveal a policy allocating the risk to depositors as a matter of law where there is no such agreement. So long as state law does not restrict a bank's freedom to enter into an agreement that allocates the risk of foreign sovereign restrictions, state law does not conflict with the federal policy reflected in current statutes or regulations. We see no such restriction in the law of New York, and hence there is no " 'significant conflict'," *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31, 97 S. Ct. 2490, 2494-95, 53 L.Ed.2d 557 (1977) (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S. Ct. 1301, 1304, 16 L.Ed.2d 369 (1966)), between New York law and federal law such as would be necessary to justify the creation of a federal common law.

We conclude that under New York law, unless the parties agree to the contrary, a creditor may collect a debt at a place where the parties have agreed that it is repayable. In applying this principle to the circumstances of the present case to affirm the judgment in favor of WFAL, we do not assume the existence of an agreement between Citibank/Manila and WFAL to permit collection in New York; rather, in light of the express finding of the district court that the parties had no agreement as to permissible situses of collection, we rely on the absence of any agreement forbidding the collection in New York.

Finally, we note that on the present remand, WFAL urged us to affirm on the basis of recently submitted evidence that in fact Citibank, while refusing to use non-Manila assets to pay Citibank/Manila's debts, has received profits of at least $25 million from Citibank/

Manila during the period 1984-1989. WFAL contends that it is entitled to have its deposits repaid out of these profits. Citibank does not dispute that it received these profits (see Citibank reply brief on remand at 20, n.18, stating that these transfers "represent a small yield on capital investment that the Central Bank permits Citibank/Manila to remit to its home office") but takes the position that it is not required to use these profits to pay persons whose deposits in Citibank/Manila remain unpaid. We need not resolve this question. Suffice it to say that Citibank's acknowledged ability to obtain Philippine Central Bank approval of transfers to it of moneys as profits appears to support the district court's finding, if further support were needed, that Citibank in fact did not satisfy its good faith obligation to seek that government's approval of repayment of WFAL's deposits to WFAL.

CONCLUSION

We have considered all of Citibank's arguments on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

APPENDIX B

110 S. Ct. 2034

SUPREME COURT OF THE UNITED STATES

No. 88-1260

CITIBANK, N.A.,

Petitioner

v.

WELLS FARGO ASIA LIMITED

Argued March 19, 1990

Decided May 29, 1990

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. REHNQUIST, C.J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion.

Robert H. Bork, Washington, D.C., for petitioner.

Thomas W. Merrill, Washington, D.C., for the U.S., as amicus curiae, supporting petitioner, by special leave of Court.

Darryl Snider, for respondent.

Justice KENNEDY delivered the opinion of the Court.

At issue here is whether the home office of a United States bank is obligated to use its general assets to repay

a Eurodollar deposit made at one of its foreign branches, after the foreign country's government has prohibited the branch from making repayment out of its own assets.

I

The case arises from a transaction in what is known in the banking and financial communities as the Eurodollar market. As the District Court defined the term, Eurodollars are United States dollars that have been deposited with a banking institution located outside the United States, with a corresponding obligation on the part of the banking institution to repay the deposit in United States dollars. See App. to Pet. for Cert. 42a; P. Oppenheim, International Banking 243 (5th ed. 1987). The banking institution receiving the deposit can be either a foreign branch of a United States bank or a foreign bank.

A major component of the Eurodollar market is interbank trading. In a typical interbank transaction in the Eurodollar market, the depositing bank (Bank A) agrees by telephone or telex, or through a broker, to place a deposit denominated in United States dollars with a second bank (Bank X). For the deposit to be a Eurodollar deposit, Bank X must be either a foreign branch of a United States bank or a foreign bank; Bank A, however, can be any bank, including one located in the United States. To complete the transactions, most banks that participate in the interbank trading market utilize correspondent banks in New York City, with whom they maintain, directly or indirectly, accounts denominated in United States dollars. In this example, the depositor bank, Bank A, orders its correspondent bank in New York (Bank B) to transfer United States dollars from Bank A's account to Bank X's account with Bank X's New York correspondent bank (Bank Y). The transfer of funds from Bank B to Bank Y is accomplished by means of a wire transfer through a clearing mechanism located in New York City and known as the Clearing House In-

terbank Payments System, or "CHIPS." See Scanlon, Definitions and Mechanics of Eurodollar Transactions, in The Eurodollar 16, 24-25 (H. Prochnow ed. 1970); Brief for New York Clearing House Association et al. as *Amici Curiae* 4. Repayment of the funds at the end of the deposit term is accomplished by having Bank Y transfer funds from Bank X's account to Bank B, through the CHIPS system, for credit to Bank A's account.

The transaction at issue here follows this pattern. Respondent Wells Fargo Asia Limited (WFAL) is a Singapore-chartered bank wholly owned by Wells Fargo Bank, N.A., a bank chartered by the United States. Petitioner Citibank, N.A., (Citibank), also a United States-chartered bank, operates a branch office in Manila, Philippines (Citibank/Manila). On June 10, 1983, WFAL agreed to make two $1 million time deposits with Citibank/Manila. The rate at which the deposits would earn interest was set at 10%, and the parties agreed that the deposits would be repaid on December 9 and 10, 1983. The deposits were arranged by oral agreement through the assistance of an Asian money broker, which made a written report to the parties that stated, *inter alia:*

> " 'Pay: Citibank, N.A. New York Account Manila
>
> " 'Repay: Wells Fargo International, New York Account Wells Fago Asia Ltd., Singapore Account # 003-023645,' " 852 F.2d 657, 658-659 (CA2 1988).

The broker also sent WFAL a telex containing the following " '[i]nstructions' ":

> " 'Settlement—Citibank NA NYC AC Manila
>
> " 'Repayment—Wells Fargo Bk Intl NYC Ac Wells Fargo Asia Ltd Sgp No 003-023645,' " *id.*, at 659.

That same day, the parties exchanged telexes confirming each of the two deposits. WFAL's telexes to Citibank/Manila read:

> " 'We shall instruct Wells Fargo Bk Int'l New York our correspondent please pay to our a/c with Wells Fargo Bk Int'l New York to pay to Citibank NA customer's correspondent USD 1,000,000.' " *Ibid.*

The telexes from Citibank/Manila to WFAL read:

> " 'Please remit US Dlr 1,000,000 to our account with Citibank New York. At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York.' " *Ibid.*

A few months after the deposit was made, the Philippine government issued a Memorandum to Authorized Agent Banks (MAAB 47) which provided in relevant part:

> " 'Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank [of the Philippines] thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.' " *Ibid.*

According to the Court of Appeals, "[a]s interpreted by the Central Bank of the Philippines, this decree prevented Citibank/Manila, an 'authorized agent bank' under Philippine law, from repaying the WFAL deposits with its Philippine assets, *i.e.*, those assets not either deposited in banks elsewhere or invested in non-Philippine enterprises." *Ibid.* As a result, Citibank/Manila refused to repay WFAL's deposits when they matured in December 1983.

WFAL commenced the present action against Citibank in the United States District Court for the Southern District of New York, claiming that Citibank in New York was liable for the funds that WFAL deposited with Citibank/Manila. While the lawsuit was pending, Citibank obtained permission from the Central Bank of the Phil-

ippines to repay its Manila depositors to the extent that it could do so with the non-Philippine assets of the Manila branch. It paid WFAL $934,000; the remainder of the deposits, $1,066,000, remains in dispute. During the course of this litigation, Citibank/Manila, with the apparent consent of the Philippine government, has continued to pay WFAL interest on the outstanding principal. See App. to Pet. for Cert. 48a.

After a bench trial on the merits, the District Court accepted Citibank's invitation to assume that Philippine law governs the action. The court saw the issue to be whether, under Philippine law, a depositor with Citibank/Manila may look to assets booked at Citibank's non-Philippine offices for repayment of the deposits. After considering affidavits from the parties, it concluded (1) that under Philippine law an obligation incurred by a branch is an obligation of the bank as a whole; (2) that repayment of WFAL's deposits with assets booked at Citibank offices other than Citibank/Manila would not contravene MAAB 47; and (3) that Citibank therefore was obligated to repay WFAL, even if it could do so only from assets not booked at Citibank/Manila. *Id.*, at 31a-35a. It entered judgment for WFAL, and Citibank appealed.

A panel of the United States Court of Appeals for the Second Circuit remanded the case to the District Court to clarify the basis for its judgment. The Second Circuit ordered the District Court to make supplemental findings of fact and conclusions of law on the following matters:

> "(a) Whether the parties agreed as to where the debt could be repaid, including whether they agreed that the deposits were collectible only in Manila.
>
> "(b) If there was an agreement, what were its essential terms?
>
> "(c) Whether Philippine law (other than MAAB 47) precludes or negates an agreement between the

parties to have the deposits collectible outside of Manila.

"(d) If there is no controlling Philippine law referred to in (c) above, what law does control?" *Id.*, at 26a.

In response to the first query, the District Court distinguished the concepts of repayment and collection, defining repayment as "refer[ring] to the location where the wire transfers effectuating repayment at maturity were to occur," and collection as "refer[ring] to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment." *Id.*, at 14a. It concluded that the parties' confirmation slips established an agreement that repayment was to occur in New York, and that there was neither an express agreement nor one that could be implied from custom or usage in the Eurodollar market on the issue of where the deposits could be collected. In response to the second question, the court stated that "[t]he only agreement relating to collection or repayment was that repayment would occur in New York." *Id.*, at 18a. As to third query, the court stated that it knew of no provision of Philippine law that barred an agreement making WFAL's deposits collectible outside Manila. Finally, in response to the last query, the District Court restated the issue in the case as follows:

"Hence, the dispute in this case . . . boils down to one question: is Citibank obligated to use its worldwide assets to satisfy plaintiff's deposits? In other words, the dispute is not so much about where repayment physically was to be made or where the deposits were collectible, but rather which assets Citibank is required to use in order to satisfy its obligation to plaintiff. As we have previously found

> that the contract was silent on this issue, we interpret query (d) as imposing upon us the task . . . of deciding whether New York or Philippine law controls the answer to that question." *Id.*, at 19a.

The District Court held that, under either New York or federal choice-of-law rules, New York law should be applied. After reviewing New York law, it held that Citibank was liable for WFAL's deposits with Citibank/Manila, and that WFAL could look to Citibank's worldwide assets for satisfaction of its deposits.

The Second Circuit affirmed, but on different grounds. Citing general banking law principles, the Court of Appeals reasoned that, in the ordinary course, a party who makes a deposit with a foreign branch of a bank can demand repayment of the deposit only at that branch. In the court's view, however, these same principles established that this "normal limitation" could be altered by an agreement between the bank and the depositor: "If the parties agree that repayment of a deposit in a foreign bank or branch may occur at another location, they authorize demand and collection at that other location." 852 F.2d, at 660. The court noted that the District Court had found that Citibank had agreed to repay WFAL's deposits in New York. It concluded that the District Court's finding was not clearly erroneous under Federal Rule of Civil Procedure 52(a), and held that, as a result, WFAL was entitled "to collect the deposits out of Citibank assets in New York." 852 F.2d, at 661.

We granted certiorari. 493 U.S. ——, 110 S. Ct. 537, 107 L.Ed.2d 534 (1989). We decide that the factual premise on which the Second Circuit relied in deciding the case contradicts the factual determinations made by the District Court, determinations that are not clearly erroneous. We vacate the judgment, and remand the case to the Court of Appeals for further consideration of the additional legal questions in the case.

II

Little need be said respecting the operation or effect of the Philippine decree at this stage of the case, for no party questions the conclusion reached by both the District Court and the Court of Appeals that Philippine law does not bar the collection of WFAL's deposits from the general assets of the Citibank in the State of New York. See 852 F.2d at 660-661; App. to Pet. for Cert. 18a. The question, rather, is whether Citibank is obligated to allow collection in New York, and on this point two principal theories must be examined. The first is that there was an agreement between the parties to permit collection in New York, or indeed at any place where Citibank has assets, an agreement implied from all the facts in the case as being within the contemplation of the parties. A second, and alternative, theory for permitting collection is that, assuming no such agreement, there is a duty to pay in New York in any event, a duty that the law creates when the parties have not contracted otherwise. See 3 A. Corbin, Contracts § 561, pp. 276-277 (1960).

The Court of Appeals appears to have relied upon the first theory we have noted, adopting the premise that the parties did contract to permit recovery from the general assets of Citibank in New York. Yet the District Court had made it clear that there is a distinction between an agreement on "repayment," which refers to the physical location for transacting discharge of the debt, and an agreement respecting "collection," which refers to the location where assets may be taken to satisfy it, and in quite specific terms, it found that the only agreement the parties made referred to repayment.

The Court of Appeals, while it said that this finding was not clearly erroneous, appears to have viewed repayment and collection as interchangeable concepts, not divisible ones. It concluded that the agreement as to where repayment could occur constituted also an agreement as

to which bank assets the depositor could look to for collection. The strongest indication that the Court of Appeals was interpreting the District Court's findings in this manner is its answer to the argument, made by the United States as *amicus curiae*, that the home office of a bank should not bear the risk of foreign restrictions on the payment of assets from the foreign branch where a deposit has been placed, unless it makes an express agreement to do so. The court announced that "[o]ur affirmance in the present case is based on *the district court's finding of just such an agreement.*" 852 F.2d, at 661 (emphasis added).

That the Court of Appeals based its ruling on the premise of an agreement between the parties is apparent as well from the authorities upon which it relied to support its holding. The court cited three cases for the proposition that an agreement to repay at a particular location authorizes the depositor to collect the deposits at that location, all of which involve applications of the act of state doctrine: *Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (CA2), cert. dismissed, 473 U.S. 934, 106 S. Ct. 30, 87 L.E.2d 706 (1985); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645, 650-651 (CA2 1984); and *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (CA2 1985). Each of these three cases turns upon the existence, or nonexistence, of an agreement for collection. In *Garcia* and *Allied Bank*, the agreement of the parties to permit collection at a location outside of the foreign country made the legal action of the foreign country irrelevant. See *Garcia*, 735 F.2d, at 646 (agreement between the parties was that "Chase's main office in New York would guarantee the certificate [of deposit] and that [the depositors] could be repaid by presenting the certificate at any Chase branch worldwide"); *id.*, at 650 (purpose of the agreement was "to ensure that, no matter what happened in Cuba, including seizure of the debt, Chase would still have a con-

tractual obligation to pay the depositors upon presentation of their CDs"); *Allied Bank*, *supra*, at 520 (agreement between the parties was that Costa Rican banks obligation to repay various loans in New York "would not be excused in the event that the Central Bank [of Costa Rica] failed to provide the necessary United States dollars for repayment"). In *Braka*, the agreement between the parties was that repayment and collection would be permitted only in the foreign country, and so the foreign law controlled. See 762 F.2d, at 224-225 (specifically distinguishing *Garcia* on the ground that the bank had not guaranteed repayment of the deposits outside of Mexico). By its reliance upon these cases, the Court of Appeals, it seems to us, must have been relying upon the existence of an agreement between Citibank and WFAL to permit collection in New York. As noted above, however, this premise contradicts the express fiinding of the District Court.

Under Federal Rule of Civil Procedure 52(a), the Court of Appeals is permitted to reject the District Court's findings only if those findings are clearly erroneous. As the Court of Appeals itself acknowledged, the record contains ample support for the District Court's finding that the parties agreed that repayment, defined as the wire transfers effecting the transfer of funds to WFAL when its deposits matured, would take place in New York. The confirmation slips exchanged by the parties are explicit: the transfer of funds upon maturity was to occur through wire transfers made by the parties' correspondent banks in New York. See *supra*, at 2037.

As to collection, the District Court found that neither the parties' confirmation slips nor the evidence offered at trial with regard to whether "an agreement concerning the place of collection could be implied from custom and usage in the international banking field" established an agreement respecting collection. See App. to Pet. for Cert. 16a-17a. Upon review of the record, we hold this

finding, that no such implied agreement existed based on the intent of the parties, was not clearly erroneous. The confirmation slips do not indicate an agreement that WFAL could collect its deposits from Citibank assets in New York; indeed, Citibank/Manila's confirmation slip, stating that "[a]t maturity *we* remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY *through Citibank New York*," see *supra*, at 2037 (emphasis added), tends to negate the existence of any such agreement. The telexes from the money broker who arranged the deposits speak in terms of repayment, and indicate no more than that repayment was to be made to WFAL's account with its correspondent bank in New York; they do not indicate any agreement about where WFAL could collect its deposits in the event that Citibank/Manila failed to remit payment upon maturity to this account.

Nor does the evidence contradict the District Court's conclusion that the parties, in this particular case, failed to establish a relevant custom or practice in the international banking community from which it could be inferred that the parties had a tacit understanding on the point. Citibank's experts testified that the common understanding in the banking community was that the higher interest rates offered for Eurodollar deposits, in contrast to dollar deposits with United States banks, reflected in part the fact that the deposits were not subject to reserve and insurance requirements imposed on domestic deposits by United States banking law. This could only be the case, argues Citibank, if the deposits were "payable only" outside of the United States, as required by 38 Stat. 270, as amended, 12 U.S.C. § 461(b)(6) and 64 Stat. 873, as amended, 12 U.S.C. § 1813(*l*)(5). It argues further that higher rates reflected the depositor's assumption of foreign "sovereign risk," defined as the risk that actions by the foreign government having legal control over the foreign branch and its assets would render the

branch unable to repay the deposit. See, *e.g.*, App. at 354-367 (testimony of Ian H. Giddy).

WFAL's experts, on the other hand, testified that the identical interest rates being offered for Eurodollar deposits in both Manila and London at the time the deposits were made, despite the conceded differences in sovereign risk between the two locations, reflected an understanding that the home office of a bank was liable for repayment in the event that its foreign branch was unable to repay for any reason, including restrictions imposed by a foreign government. See, *e.g.*, App. at 270-272 (testimony of Gunter Dufey).

A fair reading of all of the testimony supports the conclusion that, at least in this trial, on the issue of the allocation of sovereign risk there was a wide variance of opinion in the international banking community. We cannot say that we are left with "the definite and firm conviction" that the District Court's findings are erroneous. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L.Ed. 746 (1948). Because the Court of Appeals' holding relies upon contrary factual assumptions, the judgment for WFAL cannot be affirmed under the reasoning used by that court.

Given the finding of the District Court that there was no agreement between the parties respecting collection from Citibank's general assets in New York, the question becomes whether collection is permitted nonetheless by rights and duties implied by law. As is its right, see *Dandridge v. Williams*, 397 U.S. 471, 475-476 and n. 6, 90 S. Ct. 1153, 1156-1157, and n. 6, 25 L.Ed.2d 491 (1970), WFAL seeks to defend the judgment below on the ground that, under principles of either New York or Philippine law, Citibank was obligated to make its general assets available for collection of WFAL's deposits. See Brief for Respondent 18, 23, 30-49. It is unclear from the opinion of the Court of Appeals which law it

found to be controlling; and we decide to remand the case for the Court of Appeals to determine which law applies, and the content of that law. See *Thigpen v. Roberts*, 468 U.S. 27, 32, 104 S. Ct. 2916, 2919, 82 L.Ed.2d 23 (1984); *Dandridge*, *supra*, 397 U.S., at 475-476, and n. 6, 90 S. Ct., at 1156-1157 and n. 6.

One of WFAL's contentions is that the Court of Appeals' opinion can be supported on the theory that it is based upon New York law. We do not think this is a fair or necessary construction of the opinion. The Court of Appeals placed express reliance on its own opinion in *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645 (CA2 1984), without citing or discussing *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5 (1984). In that case, the New York Court of Appeals was explicit in pointing out that its decision was in conflict with that reached two days earlier by the Second Circuit in *Garcia*, *supra*, a case that the *Perez* court deemed "similar on its facts." See 61 N.Y.2d, at 464, n. 3, 474 N.Y.S.2d, at 693, n. 3, 463 N.E.2d, at 9, n. 3. Given this alignment of authorities, we are reluctant to interpret the Court of Appeals' decision as resting on principles of state law. The opinion of the Court of Appeals, moreover, refers to "general banking law principles" and "United States law," 852 F.2d, at 660; whether this is the semantic or legal equivalent of the law of New York is for the Court of Appeals to say in the first instance.

Alternatively, if the Court of Appeals, based upon its particular expertise in the law of New York and commercial matters generally, is of the view that the controlling rule is supplied by Philippine law or, as Citibank would have it, by a federal common law rule respecting bank deposits, it should make that determination, subject to any further review we deem appropriate. In view of our remand, we find it premature to consider the other contentions of the parties respecting the necessity for any

rule of federal common law, or the preemptive effect of federal statutes and regulations on bank deposits and reserves. See 12 U.S.C. §§ 461(b)(6), 1813(*l*)(5)(A); 12 CFR § 204.128(c) (1990). All of these matters, of course, may be addressed by the Court of Appeals if necessary for a full and correct resolution of the case.

The judgment of the Court of Appeals is vacated, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, concurring.

Upon reading the opinion of the Court in this case, one may fairly inquire as to why certiorari was granted. The opinion decides no novel or undecided question of federal law, but simply recanvasses the same material already canvassed by the Court of Appeals and comes to a different conclusion than that court did. I do not believe that granting plenary review in a case such as this is a wise use of our limited judicial resources. But the Court by its grant of certiorari has decided that the case should be considered on the merits. See *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 559, 77 S. Ct. 457, 478 1 L.Ed.2d 511 (1957) (Harlan, J., dissenting). I join the opinion of the Court.

Justice STEVENS, dissenting.

The Court wisely decides this case on a narrow ground. Its opinion, however, ignores an aspect of the case that is of critical importance for me.

The parties agree that Citibank assumed the risk of loss caused by either the insolvency of its Manila branch, or by an act of God.** Citibank argues that only the so-

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** *E.g.*, Brief for Petitioner 16, n. 26; Brief for Respondent 15, 39-40; Tr. of Oral Arg. 10, 16 (petitioner); *id.*, at 31-32 (United States as *amicus curiae* in support of petitioner).

called "sovereign risk" is excluded from its undertaking to repay the deposit out of its general assets. In my opinion such a specific exclusion from a general undertaking could only be the product of an express agreement between the parties. The District Court's finding that no such specific agreement existed is therefore dispositive for me.

Accordingly, I would affirm the judgment of the Court of Appeals.

APPENDIX C

852 F.2d 657

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 87-7685

WELLS FARGO ASIA LIMITED,
Plaintiff-Appellee,

v.

CITIBANK, N.A.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York

Argued February 16, 1988
Final Briefs Submitted June 14, 1988
Decided July 18, 1988

Darryl Snider, San Francisco, Cal. (Duncan E. Haynes, Thomas M. Peterson, Jessica M. Hoover, Brobeck, Phleger & Harrison, San Francisco, Cal., Edwin E. McAmis, Skadden, Arps, Slate, Meagher & Flom, New York City, on the brief), for plaintiff-appellee.

John E. Hoffman, Jr., New York City (John J. Roche, Henry Weisburg, Jennifer Freeman, Rachel E. Deming, Melissa A. Samet, David Ledecky, Shearman & Sterling, New York City, Antonio V. Agcaoili, Agcaoili & Associates, Manila, Philippines, on the brief), for defendant-appellant.

John L. Warden, New York City (Michael Straus, Sullivan & Cromwell, New York City, Norman R. Nelson, Lawrence R. Uhlick, on the brief), for the New York Clearing House Ass'n and the Institute of Intern. Bankers as amici curiae urging reversal.

Richard K. Willard, Asst. Atty. Gen., Washington, D.C. (John R. Bolton, Asst. Atty. Gen., James J. Spears, Deputy Asst. Atty. Gen., Anthony J. Steinmeyer, Jay S. Bybee, Civil Div. of the Dept. of Justice; Abraham D. Sofaer, Legal Advisor, Dept. of State; Mark Sullivan III, General Counsel, D. Edward Wilson, Jr., Acting General Counsel, Dept. of the Treasury; Michael Bradfield, General Counsel, Ricki Rhodarmer Tigert, Asst. General Counsel, Board of Governors of the Federal Reserve System; John L. Douglas, General Counsel, Federal Deposit Ins. Corp., Robert B. Serino, Deputy Chief Counsel, Office of the Comptroller of the Currency, all of counsel), filed briefs for the U.S. as amicus curiae urging reversal.

Before TIMBERS, KEARSE, and MAHONEY, Circuit Judges.

KEARSE, Circuit Judge:

Defendant Citibank, N.A. ("Citibank"), appeals from a final judgment entered in the United States District Court for the Southern District of New York after a bench trial before Whitman Knapp, *Judge*, awarding plaintiff Wells Fargo Asia Limited ("WFAL") $1,066,000 as the balance due on certain time deposits carried by Citibank's branch in Manila, Philippines ("Citibank/Manila"). *See* 660 F. Supp. 946 (1987) ("1987 Opinion"). Citibank contends that judgment should have been entered in its favor because the obligation to repay the deposits was suspended by a decree of the Philippine government. For the reasons below, we affirm the judgment.

BACKGROUND

The pertinent facts, as found by the district court in a Memorandum and Order dated April 22, 1988 ("1988 Opinion"), and a Memorandum and Order published at 612 F. Supp. 351 (1985), and adopted in the 1987 Opinion, 660 F. Supp. at 947, are as follows. On June 10, 1983, WFAL, a Singapore-chartered bank wholly owned by the United States-chartered Wells Fargo Bank, N.A., placed two six-month, nonnegotiable U.S. $1,000,000 deposits with Citibank/Manila. The placements were initially arranged orally by the parties' traders with the assistance of an Asian money broker, Astley & Pearce ("Astley"). Astley's report to the parties stated, *inter alia:*

> Pay: Citibank, N.A. New York Account Manila
>
> Repay: Wells Fargo International, New York Account Wells Fargo Asia Ltd., Singapore Account #003-023645

Astley sent WFAL a telex containing the following "[i]nstructions":

> Settlement—Citibank NA NYC AC Manila
>
> Repayment—Wells Fargo Bk Intl NYC Ac Wells Fargo Asia Ltd Sgp No 003-023645

Thereafter, the parties exchanged written confirmations with respect to each deposit. WFAL's confirmation slips to Citibank stated:

> We shall instruct Wells Fargo Bk Int'l New York our correspondent please pay to our a/c with Wells Fargo Bk Int'l New York to pay to Citibank NA customer's correspondent USD 1,000,000.

The telexes from Citibank/Manila to WFAL stated:

> Please remit US Dlr 1,000,000 to our account with Citibank New York. At maturity we remit US Dlr

> 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York.

The deposits were to mature on December 9 and 10, 1983. On October 15, 1983, the Philippine government issued a Memorandum to Authorized Agent Banks ("MAAB 47") which provided in part as follows:

> Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank [of the Philippines] thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.

As interpreted by the Central Bank of the Philippines, this decree prevented Citibank/Manila, an "authorized agent bank" under Philippine law, from repaying the WFAL deposits with its Philippine assets, *i.e.*, those assets not either deposited in banks elsewhere or invested in non-Philippine enterprises. Citibank/Manila did not repay WFAL's deposits upon maturity.

WFAL commenced the present action on February 10, 1984. Thereafter, Citibank/Manila sought and received from the Central Bank of the Philippines permission to repay its foreign depositors to the extent it could do so with non-Philippine assets. Accordingly, Citibank/Manila paid WFAL $934,000. The remainder of the $2,000,000 deposited, *i.e.*, $1,066,000, remained in dispute.

In its 1987 Opinion, the district court, "accept[ing] plaintiff's invitation to assume that Philippine law governs this action," ruled that "under Philippine law, Citibank's worldwide assets are available for satisfaction of plaintiff's claim." 660 F. Supp. 947, 950. Judgment was entered in favor of WFAL, and this appeal followed.

In an order dated March 25, 1988, this Court made a limited remand to the district court for clarification of the basis of the judgment. We asked the court to make a finding as to, *inter alia*, "[w]hether the parties agreed as to where the debt could be repaid, including whether they agreed that the deposits were collectible only in Manila." Accordingly, in its 1988 Opinion, the district court made supplemental findings of fact and conclusions of law. The court found that the parties "agree[d] that repayment was to occur in New York." *Id.* at 6. Interpreting collectibility to be different from repayability (stating that "[r]epayment refers to the location where the wire transfers effectuating repayment at maturity were to occur," while "[c]ollection refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment" (*id.* at 4)), the court concluded that the parties had reached no agreement as to where the debt was collectible. Responding to the other questions posed in our March 25 order, the district court ruled that New York law, rather than Philippine law, governed the dispute; that under New York law, Citibank's worldwide assets were available for satisfaction of WFAL's claim; and that apparently no provision of Philippine law precluded an agreement between the parties to make the deposits collectible outside of Manila. The court thus reaffirmed the judgment in favor of WFAL.

The parties and the United States as amicus curiae have filed supplemental briefs addressing the district court's 1988 Opinion. In light of the district court's supplemental findings of fact and conclusions of law, we affirm the judgment.

DISCUSSION

In general, a creditor may collect or enforce a debt wherever he can obtain jurisdiction over the debtor. *Harris v. Balk*, 198 U.S. 215, 222-23, 225, 25 S. Ct. 625,

626-27, 627, 49 L.Ed. 1023 (1905). "'"All debts are payable everywhere, unless there be some special limitation or provision in respect to the payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere."'" *Id.* at 225, 25 S. Ct. at 628 (quoting *Chicago, Rock Island & Pacific Ry. v. Sturm*, 174 U.S. 710, 716-17, 19 S. Ct. 797, 800, 43 L.Ed 1144 (1899) (quoting 2 *Parsons on Contracts* 702 (8th ed.))).

A special limitation has traditionally been recognized under general banking law principles. Thus, "'[t]he situs of a bank's debt on a deposit is considered to be at the branch where the deposit is carried . . . .'" *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 862 (2d Cir. 1981) (certificate of deposit) (quoting Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 Law & Pol. Int'l Bus. 903, 975 (1979)), *cert. denied*, 459 U.S. 976, 103 S. Ct. 313, 74 L.Ed.2d 291 (1982); *United States v. Guaranty Trust Co.*, 100 F.2d 369, 371 (2d Cir. 1938) (deposit not evidenced by certificate); *Zimmermann v. Miller*, 2 F.2d 629, 631 (S.D.N.Y. 1924) (same), *rev'd on other grounds*, 7 F.2d 443 (2d Cir. 1925), *aff'd*, 274 U.S. 253, 47 S. Ct. 625, 71 L.Ed. 1034 (1927). The consequence of this limitation is that a debt on a deposit normally authorizes a demand for the money only at the relevant branch.

This normal limitation on the situs of a banking debt is, however, subject to variation by agreement of the parties. If the parties agree that repayment of a deposit in a foreign bank or branch may occur at another location, they authorize demand and collection at that other location. *See Allied Bank International v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.)

(situs of debt on deposits in Costa Rican banks was New York where deposits were to be repaid New York), *cert. dismissed*, 473 U.S. 934, 106 S. Ct. 30, 87 L.Ed.2d 706 (1985); *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645, 650-51 (2d Cir. 1984) (situs of debt, for act-of-state-doctrine purposes, on deposits in Cuban branch was not limited to Cuba where deposits were payable at other branches around the world); *id.* at 651-52 (Kearse, J., dissenting); *cf. Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (situs of debt was "wholly" within Mexico for act-of-state-doctrine purposes where deposit contracts specified Mexico as place of repayment).

We agree with the district court that an agreement by the parties to make a deposit debt repayable at a place other than the bank branch carrying the deposit appears to be valid under Philippine law as well as United States law. *See* Civil Code of the Philippines art. 1159 ("Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.") Whether or not the parties have entered into such an agreement is a question of fact, and a finding of such an agreement is subject to review under the "clearly erroneous" standard, Fed. R. Civ. P. 52(a). *See Wards Co. v. Stamford Ridgeway Associates*, 761 F.2d 117, 120 (2d Cir. 1985).

In the present case, the district court found that the parties had agreed that repayment was to occur in New York. That finding plainly is not clearly erroneous. The Astley reports stated "Repay: Wells Fargo International, *New York Account* Wells Fargo Asia Ltd., Singapore," and "Repayment—Wells Fargo Bk Intl *NYC Ac* Wells Fargo Asia Ltd Spg . . . ." (Emphasis added.) The written confirmations exchanged by the parties were similar. For example, Citibank/Manila's own telexes to WFAL stated: "At maturity we remit US Dlr 1,049,444.44 *to your account with Wells Fargo Bank Intl Corp NY through Citibank New York.*" (Emphasis

added.) The repeated references to repayments or remittances at maturity to New York accounts amply support the district court's finding that the parties agreed that repayment would be made in New York. Since MAAB 47 has no effect on a bank's obligations to perform acts outside of the Philippines, we conclude that the district court did not err in upholding WFAL's claim.

The district court's view that repayment and collection are divisible concepts does not require a different result. The above authorities suggest that a debt may be collected wherever it is repayable, unless the parties have agreed otherwise. Since the court found here that there was no separate agreement restricting where the deposits could be collected, and we are aware of nothing in the record that contradicts that finding, we conclude that WFAL was entitled to collect the deposits out of Citibank assets in New York.

Finally, we note that the gist of the concerns expressed by the amici is their "policy interest in the principle that, *in the absence of agreement to the contrary*, a U.S. bank should not bear the risk that a foreign government will impose restrictions on the deposits of its foreign branches." (Letter of the United States to this Court, dated June 14, 1988; emphasis added). Our affirmance in the present case is based on the district court's finding of just such an agreement.

CONCLUSION

The judgment of the district court is affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 87-7685

WELLS FARGO ASIA LIMITED,
Plaintiff-Appellee,

v.

CITIBANK, N.A.,
Defendant-Appellant.

Order Denying Motion of Citibank for Rehearing and Suggestion for Hearing *En Banc* Entered on September 27, 1988

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant, CITIBANK, N.A. and Amicus Curiae NY CLEARING HOUSE & INSTITUTE OF INTERNATIONAL BANKERS.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By: /s/ Fred Cassidy

APPENDIX E

695 F. Supp. 1450

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84 Civ. 996 (WK)

WELLS FARGO ASIA LIMITED,
Plaintiff,

v.

CITIBANK, N.A.,
Defendant.

April 22, 1988

Edwin E. McAmis, Skadden, Arps, Slate, Meagher & Flom, New York City (Mitchell C. Sockett, of counsel), Darryl Snider, Brobeck, Phleger & Harrison, San Francisco, Cal. (Duncan E. Haynes, Jessica M. Hoover, Susan E. Samuels, of counsel), for plaintiff.

John E. Hoffman, Jr., Shearman & Sterling, New York City (Henry Weisburg, Jennifer Freeman, Robert S. Fischler, Melissa Samet, of counsel), for defendant.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

On March 25, 1988 the Court of Appeals 847 F.2d 837 (2d Cir. 1988) (hereinafter "The Court") remanded this action, finding it unclear whether our opinion disposing of this case had found that the parties had agreed that the deposits were collectible only at Citibank's Manila

branch or whether we had held that Philippine law governed this action. In point of fact, we made no decision on either of these questions although they had been extensively argued. Before attempting to answer them, we shall—by way of background—briefly explain our earlier decision to avoid such determinations.

Ever since this lawsuit began, the parties have vigorously contested the issues underlying both these questions. On plaintiff's motion for summary judgment, it contended that the contract made the deposits payable in New York, and that MAAB 47 did not purport to prohibit repayment of the deposits in New York with Citibank's general assets. Citibank, on the other hand, contended that discovery would reveal an understanding in the banking community that foreign branch deposits are payable only in the country where the branch is located, and subject to the host country's laws. Throughout the trial, Wells Fargo maintained the position that New York law applied, and Citibank continued to insist that the case was governed by the law of the Philippines, including MAAB 47, which was claimed to have excused repayment of plaintiff's deposits.

After the trial had been completed, it turned out—as noted in Citibank's brief to the Court (at 15-16)—that the complete extent of the evidence concerning Philippine law consisted of "two affidavits by Philippine lawyers" totalling "less than fourteen pages." [1] Upon that state of the record, Wells Fargo, while reiterating its earlier positions, also submitted that it would prevail even if we were to assume that Philippine law governed. We accepted this invitation to decide the case under Philippine

[1] In its brief to the Court (at 16) Citibank observes that "Judge Knapp did not request any further submission or testimony regarding Philippine law." We gather from this statement that Citibank thinks we should have treated it as some sort of *pro se* litigant and taken responsibility for assuring that it had adequately researched the law it had for over two years been urging us to apply.

law, on the further assumption (which seemed to us reasonable) that Citibank had put its best foot forward in presenting its views as to that law.

It turned out, however, that Citibank was by no means so satisfied, and presented the Court with a wealth of material on Philippine law which it had never brought to our attention. Had Citibank made a motion before us to reconsider our decision on the basis of this additional authority, we certainly would have granted such a motion and would then have proceeded to decide all the issues of fact and questions of law which had been presented to us,[2] declining what would then have appeared to be an ill-considered invitation by Wells Fargo. It is on that basis that we shall now answer the specific questions posed by the Court.

(a) *Whether the parties agreed as to where the debt could be repaid, including whether they agreed that the deposits were collectible only in Manila.*

At the outset, it appears to us that repayment and collection describe two distinct concepts. Repayment refers to the location where the wire transfers effectuating repayment at maturity were to occur. Collection refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment.

Of course, the contract itself is the first place we must look to determine the parties' agreement.

Neither party disputes the formation of a binding deposit contract, nor is it disputed that the placements were

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[2] Citibank, in its brief to the Court (at 18) and again in its reply brief (at 1-2), states that we had "decided" that Philippine law determines the deposit obligations in this case. As our opinion was intended to make clear, we expressly refrained from making any such decision, but acted on the *assumption* that Philippine law was controlling.

initially arranged over the telephone by the parties' traders with the assistance of an Asian money-broker, Astley & Pearce. No evidence was introduced as to what the traders said, or even whether they spoke to each other directly or conducted their negotiations entirely through the broker. The only clue we have on this subject is the report prepared by the broker for the parties. The document sent by Astley & Pearce, states (Pl.Ex. 10) :[3]

> Borrower: Citibank, N.A. Manila
> Lender: Wells Fargo Asia Ltd., Singapore
> We hereby confirm having negotiated the following deposit/placement on your behalf:
> Amount: US$1,000,000.00
> Rate: 10%
> Term: 178 das.
> From: 14-06-83 To: 09-12-83
>
> * * * *
>
> Pay: Citibank, N.A. New York Account Manila
> Repay: Wells Fargo International, New York
> Account: Wells Fargo Asia Ltd., Singapore
> Account # 003-023645.

A telex sent by Astley & Pearce to Wells Fargo (Pl.Ex. 12) similarly states:

> We confirm having arranged the following for your account and risk—
> Principal: US 1,000,000
> Rate: 10
> From: 14/06/83 To: 9/12/83
> 14/06/83 12/12/83
>
> Instructions:
>
> Settlement—Citibank NA NYC Ac Manila
> Repayment—Wells Fargo Bk Intl NYC
> Ac Wells Fargo Asia Ltd Sgp No 003-023645

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[3] Pl.Ex. 11, reflecting the second deposit, is identical in all respects except that the term is 181 days, and the maturity date is accordingly 12-12-83.

Subsequently, Wells Fargo and Citibank exchanged written confirmations (Pl.Ex. 4-9). Wells Fargo's confirmation slips state (Pl.Ex. 8, 9):

> We shall instruct Wells Fargo Bk Int'l New York our correspondent please pay to our a/c with Wells Fargo Bk Int'l New York to pay to Citibank NA customer's correspondent USD 1,000,000.

The telexes from Citibank's Manila office to Wells Fargo in Singapore state (Pl.Ex. 4-7):

> Please remit US Dlr 1,000,000 to our account with Citibank New York. At maturity we remit US Dlr 1,049,444.44 to your account with Wells Fargo Bank Intl Corp NY through Citibank New York.

These various confirmations reflect that the interbank placements were accomplished through a series of wire transfers by the parties' correspondent banks in New York, and that, at maturity, the deposits were to be repaid by Citibank, N.A. (Citibank's New York correspondent bank) to Wells Fargo Bank International (Wells Fargo's New York correspondent bank) for the account of Wells Fargo's Singapore office. Thus, the confirmations establish an agreement that repayment was to occur in New York.

As to the second component of the Court's question, whether the parties agreed that the deposits were collectible only in Manila, the confirmation slips are silent. At trial, both sides offered evidence aimed at establishing that an agreement concerning the place of collection could be implied from custom and usage in the international banking field. This evidence consisted of testimony from various bankers about their interbank placement practices and their understanding of sovereign risk. In addition, each party's expert testified on these topics. In particular, each expert analyzed the relevant interest rates which were claimed to support his own opinion or defeat the

view of the opposing party's expert. Citibank, for example, sought to demonstrate an understanding that the depositor could collect only in the country where the deposit was placed, i.e., the Philippines, on the theory that "sovereign risk" accounted for the fact that interest rates in Manila were higher than those in New York. Wells Fargo, on the other hand, introduced evidence aimed at showing an understanding within the Eurodollar market that the depositor could look to the head office for repayment. Wells Fargo's witnesses stressed the identity of the interest rates in Manila and in concededly less risky locations such as London.[4] In our prior opinion (J.A. 596; 660 F. Supp. 946, at 950) we observed that neither party succeeded in establishing any universal understanding amounting to custom or practice within the banking community which would imply a collection term into the contract. We believe that observation to have been correct, and now so find.

In summary, since the deposit contracts do not reflect any agreement on the issue of where the deposits could be collected, and since no term can be implied based on custom or usage in the Eurodollar market, we find that the parties failed to come to an agreement on this question.

(b) *If there was an agreement, what were its essential terms?*

The only agreement relating to collection or repayment was that repayment would occur in New York.

(c) *Whether Philippine law (other than MAAB 47) precludes or negates an agreement between the parties to have the deposits collectible outside Manila?*

We know of no such provision of Philippine law.

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[4] There was dispute between the parties as to whether or not Eurodollar deposits earned the same interest if made in secure localities such as London or presumably riskier places such as Manila. We previously found that Citibank's Eurodollar interest rate was identical in all localities (J.A. 597; 660 F. Supp. at 950).

(d) *If there is no controlling Philippine law referred to in (c) above, what law does control?*

Much of the confusion which has transformed this case from a simple breach of contract action into one which—it is claimed—threatens the foundations of the international monetary system stems, in our view, from the fact that the parties have never been able to agree as to exactly what they are fighting about. In Citibank's view, the real dispute in this case is whether MAAB 47 provided a legally valid reason for Citibank to avoid payment of plaintiff's deposits, which are conceded to be due. Citibank argued as follows: the deposits are payable only in Manila subject to Philippine law; MAAB 47 prevents repayment in Manila; therefore, Citibank has a legally recognized reason to avoid payment. Wells Fargo, however, never serously contested the proposition that MAAB 47 prevented Citibank from using the assets booked at its Manila branch toward repayment of plaintiff's deposits.[5] Rather, the portion of Citibank's syllogism that Wells Fargo challenges is the contention that Citibank's obligation to satisfy the deposits is limited to the assets booked at Citibank's Manila branch. Wells Fargo contends that under New York law, which it claims governs this action, it is entitled to look to all of Citibank's assets for repayment, even if MAAB 47 disabled the Manila branch from using its own assets to meet the deposit obligations. Hence, the dispute in this case—to which most of the trial was devoted in the guise of discussing "sovereign risk"—boils down to one question: is Citibank obligated to use its worldwide assets to satisfy plaintiff's deposits? In other words, the dispute is not so much about where repayment physically was to be made or where the deposits

[5] In our previous order, we found that MAAB 47 prevented the use of assets booked at Citibank's Manila branch (both Philippine and non-Philippine assets), but that it did not prohibit use of assets carried on the books of any other Citibank branch (J.A. 590-591; 660 F. Supp. at 948).

were collectible,[6] but rather which assets Citibank is required to use in order to satisfy its obligation to plaintiff. As we have previously found that the contract was silent on this issue, we interpret query (d) as imposing upon us the task (which so far we have been able to avoid) of deciding whether New York or Philippine law controls the answer to that question.

The legal principles governing our determination are straightforward. Jurisdiction in this action is asserted both on the basis of diversity and federal question involving 12 U.S.C. § 632. In diversity cases, of course, we must apply the conflict of law doctrine of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.* (1941) 313 U.S. 487, 61 S. Ct. 1020, L.Ed. 1477. In federal question cases, we are directed to apply a federal common law choice of law rule to determine which jurisdiction's substantive law should apply. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, (2d Cir. 1980) 629 F. 2d 786, 794-95, *cert. denied* (1981) 449 U.S. 1080, 101 S. Ct. 863, 66 L.Ed.2d 804. The rule in New York is that "the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining State interests are those which relates to the purpose of the particular law in conflict." *Intercontinental Planning, Ltd. v. Daystrom, Inc.* (1969) 24 N.Y.2d 372, 382, 300 N.Y.S.2d 817, 825,

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[6] Unlike many of the cases cited to us by Citibank, *e.g., Perez v. Chase Manhattan Bank, N.A.* (1984) 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5; *Braka v. Bancomer* (2d Cir. 1985) 762 F.2d 222; *Garcia v. Chase Manhattan Bank, N.A.* (2d Cir. 1984) 735 F.2d 645; *Vishipco Line v. Chase Manhattan Bank, N.A.* (2d Cir. 1981) 660 F.2d 854; *Callejo v. Bancomer* (5th Cir. 1985) 764 F.2d 1101; this case does not involve certificates of deposit or similar tangible documents that must be presented at a particular branch in order to secure repayment. On the contrary, Citibank's obligation to remit the funds to Wells Fargo was triggered by the passage of time, and Wells Fargo was not required to make a "demand" or take any other action in Manila or anywhere else.

248 N.E.2d 576, 582. Federal law invokes similar considerations, *see, Corporacion Venezolana*, 629 F.2d at 795, and the place of performance is considered an important factor. *Citibank, N.A. v. Benkoczy* (S.D. Fla. 1983) 561 F. Supp. 184, 186 and cases cited therein.

Regardless of whether the New York or federal test is used, application of these standards leads us to the conclusion that New York law should be used to evaluate Wells Fargo's contenton that Citibank's worldwide assets are available for repayment of the deposits. As the New York Court of Appeals has recognized, "New York . . . is a financial capital of the world, serving as an international clearing house and market place for a plethora of international transactions . . . . In order to maintain its preeminent financial position, it is important that the justified expectations of the parties to the contract be protected." *J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.* (1975) 37 N.Y.2d 220, 227, 371 N.Y.S.2d 892, 898, 333 N.E.2d 168, 172. In our view, these expectations will be best promoted by applying a uniform rule of New York law where, as here, the transactions were denominated in United States dollars and settled through the parties' New York correspondent banks, and where the defendant is a United States bank with headquarters in New York. Since Eurodollar transactions denominated in U.S. dollars customarily are cleared in New York (Howard Tr. 450), the rationale for application of New York law becomes even stronger. If the goal is to promote certainty in international financial markets, it makes sense to apply New York law uniformly, rather than conditioning the deposit obligations on the vagaries of local law, and requiring each player in the Eurodollar market to investigate the law of numerous foreign countries in order to ascertain which would limit repayment of deposits to the foreign branch's own assets.

As to what New York's law is on this question, the answer is not entirely clear. In at least one older case,

the Second Circuit, interpreting New York law, concluded that there was no obligation due at the main branch to a depositor in another branch. *United States v. First National City Bank* (2d Cir. 1963) 321 F.2d 14, *aff'd on rehearing en banc* (2d Cir. 1964) 325 F.2d 1020, *rev'd on other grounds* (1965) 379 U.S. 378, 85 S. Ct. 528, 13 L.Ed.2d 365. However, the most recent pronouncement on this subject by New York's highest court, which we believe binds us, holds that the parent bank is ultimately liable for the obligations of the foreign branch. *Perez v. Chase Manhattan National Bank, N.A.* (1984) 61 N.Y.2d 460, 468, 474 N.Y.S.2d 689, 691, 463 N.E.2d 5, 7, *citing, Sokoloff v. National City Bank of N.Y.* (Sup. Ct. N.Y. Cty. 1927) 130 Misc. 66, 73, 224 N.Y.S. 102, 114, *aff'd* (1928) 223 App.Div. 754, 227 N.Y.S. 907, *aff'd* (1928) 250 N.Y. 69, 164 N.E. 745. *Accord, Vishipco Line v. Chase Manhattan Bank, N.A.* (2d Cir. 1981) 660 660 F.2d 854, 863.

Notwithstanding this general rule, there are circumstances in which we believe a New York court would defer to local law. For example, if the Philippines had confiscated plaintiff's deposits, New York courts would interpret the expropriation as a compulsory assignment of the depositor's rights, so that payment to the Philippine assignee would discharge the debt. A New York court would further recognize such compulsory assignment as an act of a foreign sovereign unreviewable under the Act of State doctrine. *Perez, supra*, 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5. We believe New York would take a similar approach in the situation where a foreign government had effected a partial confiscation in the form of a tax on a deposit made at a foreign branch. *See, Dunn v. Bank of Nova Scotia* (5th Cir. 1967) 374 F.2d 876. However, we are aware of no persuasive authority to tell us to what extent, if any, a New York court would defer to local law in the situation here presented, where the foreign sovereign did not extinguish the

branch's debt either in whole or in part but merely conditioned repayment on the obtaining of approval from a government agency. Fortunately, we need not resolve that troublesome question. It is not presented by the record before us.

Citibank's answer in this action attempts to raise a circumstance requiring deference to local law by asserting, as an affirmative defense, that "MAAB No. 47 excuses Citibank's performance of the deposit arrangements." (Answer ¶ 25). Throughout this litigation, we and the parties have treated this allegation as raising an impossibility defense. Of course, the Decree itself must provide the parameters for evaluating such a defense. MAAB 47 provides, in pertinent part:

> Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank thru [sic] the Management of External Debt and Investment Accounts Department (MEDIAD) *for prior approval.*
>
> Accordingly, total obligations to foreign banks/financial institutions as of the end of business hours in New York City on October 14, 1983, shall not be reduced *without prior Central Bank approval.* (Emphasis supplied)

Thus, the Decree specifically contemplates that obligations to foreign banks may be repaid as long as prior Central Bank approval is obtained.

With respect to Citibank's efforts to comply with the Decree, we refer back to the three types of assets which we discussed in our prior opinion. In the case of assets carried on the books of Citibank's Manila branch, those which are invested with entities situated in the Philippines are considered Philippine (or local) assets, while those deposited in banks located outside the Philippines or

invested in non-Philippine enterprises are called non-Philippine assets. It is not disputed that Citibank sought but did not obtain approval for its Manila branch to use its Philippine (or local) assets toward repayment of the Deposits. It is further undisputed that Citibank applied for and did receive Central Bank permission for its Manila branch to repay foreign depositors to the extent of the non-Philippine assets carried on the books of that branch. This approval resulted in the partial repayment of $934,000. However, no permission was ever sought to use the third category of assets here at issue, namely, assets booked at Citibank's offices outside the Philippines. Hence, assuming without deciding that MAAB 47 required Citibank to secure permission in order to use its worldwide assets, we have no way of knowing whether or not approval would have been granted. We can, however, say with certainty that, having failed to request approval, Citibank's impossibility defense must fail. When the "government or other restraint does not render performance absolutely impossible, it is the duty of the promisor to make a bona fide effort to dissolve and be relieved of the restraint which operates to prevent his performance." *Brown v. J.P. Morgan* (Sup. Ct. N.Y. Cty. 1941) 177 Misc. 626, 31 N.Y.S.2d 323, 334, *rev'd on other grounds* (1st Dep't 1943) 265 App.Div. 631, 40 N.Y.S.2d 229, *aff'd* (1946) 295 N.Y. 867, 67 N.E.2d 263. In our earlier order, we made a finding that Citibank had not satisfied its good faith obligation to seek the government's consent to use the assets booked at Citibank's non-Philippine offices (J.A. 598, 660 F. Supp. at 950-951), and we hereby reaffirm that finding.

In summary, we conclude that under New York law, which governs this question, Citibank is liable for the debt of its Manila branch and plaintiff is entitled to look to Citibank's worldwide assets for satisfaction of its deposits. We do not express any view as to what the New York courts would have done in the event that Citibank had requested authorization to use such assets, and approval

had been denied. That situation is not presented on this record.

We therefore conclude that no amended judgment is appropriate and reaffirm the one previously entered.

The foregoing shall constitute our supplemental findings of fact and conclusions of law. The Clerk is directed forthwith to certify this Memorandum and Order to the Court of Appeals.

SO ORDERED.

APPENDIX F

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 87-7685

WELLS FARGO ASIA LIMITED,
Appellee,

v.

CITIBANK, N.A.,
Appellant.

Order Directing Limited Remand
Entered On March 25, 1988

Before: TIMBERS, KEARSE, and MAHONEY, Circuit Judges.

Appellant Citibank, N.A. ("Citibank") appeals from a judgment entered July 6, 1987 in the United States District Court for the Southern District of New York, Whitman Knapp, *District Judge.* The court held Citibank liable to pay on two certificates of deposit made by Wells Fargo Asia Limited ("WFAL") at Citibank's Manila, Philippines, branch although that branch was unable to pay with its assets located in the Philippines because of a Philippine sovereign decree (MAAB 47).

The case was argued before us on February 18, 1988 and we reserved decision.

We find it unclear from the district court's Memorandum and Order dated May 28, 1987, whether the court found that the parties agreed that the deposits were collectible only at the Manila branch of Citibank or elsewhere as well. We also find it unclear whether the district court found that Philippine law other than

MAAB 47 precludes or negates an agreement between the parties to have the deposits collectible outside of Manila.

Accordingly, to enable this Court to have the foregoing information before we decide the case, it is

ORDERED as follows:

(1) That the case is remanded to the district court for the limited purpose of making supplemental findings of fact and conclusions of law upon the following matters:

(a) Whether the parties agreed as to where the debt could be repaid, including whether they agreed that the deposits were collectible only in Manila.

(b) If there was an agreement, what were its essential terms?

(c) Whether Philippine law (other than MAAB 47) precludes or negates an agreement between the parties to have the deposits collectible outside of Manila.

(d) If there is no controlling Philippine law referred to in (c) above, what law does control?

(2) That the district court's supplemental findings of fact and conclusions of law, together with an amended judgment if appropriate, shall be filed in the district court not later than thirty (30) days from the date of this order and thereupon the clerk of the district court shall promptly certify to our Court a supplemental record containing said documents.

(3) That within ten (10) days after the district court files the documents referred to in (2) above, the parties (Citibank and WFAL) may serve and

file in this Court supplemental letter briefs, not more than ten (10) pages in length, directed to the issues on this limited remand. No letter briefs from the amici curiae are requested.

(4) That thereupon this matter will be taken on submission. This Court, and particularly this panel, retains jurisdiction.

/s/ William H. Timbers
WILLIAM H. TIMBERS

/s/ Amalya L. Kearse
AMALYA L. KEARSE

/s/ J. Daniel Mahoney
J. DANIEL MAHONEY
Circuit Judges

APPENDIX G

660 F. Supp. 946

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84 Civ. 996 (WK)

WELLS FARGO ASIA LIMITED,
Plaintiff,

v.

CITIBANK, N.A.,
Defendant.

May 28, 1987

Edwin E. McAmis, Skadden, Arps, Slate, Meagher & Flom, New York City (Mitchell C. Sockett, of counsel), and Darryl Snider, Brobeck, Phleger & Harrison, San Francisco, Cal. (Duncan E. Haynes, Jessica M. Hoover and Susan E. Samuels, of counsel), for plaintiff.

John E. Hoffman, Jr., Shearman & Sterling, New York City (Henry Weisburg, Jennifer Freeman, Robert S. Fischler and Melissa Samet, of counsel), for defendant.

Joyce E. Motylewski, Federal Reserve Bank of New York, Office of General Counsel, and New York Clearing House Ass'n, Sullivan & Cromwell, New York City (John L. Warden, H. Rodgin Cohen and Michael Straus, of counsel), for amici curiae.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

By this action, Wells Fargo Asia Limited ("Wells Fargo") seeks to recover from Citibank, N.A. ("Citibank") the balance concededly due on two one-million dollar time deposits (the "Deposits") with Citibank's

Manila branch maturing respectively on December 9 and 10, 1983. Citibank declined payment on the maturity dates because of the existence of a Philippine governmental decree ("MAAB 47" or "the Decree") which forbade the repayment of the principal of certain foreign currency obligations without prior approval of the Central Bank of the Philippines ("Central Bank"). Citibank subsequently obtained approval for partial repayment and remitted to Wells Fargo the sum of $934,000. Citibank has declined any further payment, contending that it is excused by the Decree.

In July 1985 we denied Wells Fargo's motion for summary judgment. *Wells Fargo Asia Limited v. Citibank, N.A.* (S.D.N.Y. 1985) 612 F. Supp. 351. The relevant facts are fully stated in that opinion, familiarity with which is assumed. Citibank resisted the motion for summary judgment by asserting that Philippine law governed the Deposits and that the Decree prohibited them from honoring plaintiff's demand without the permission of the Central Bank, which permission had been impossible to obtain. We concluded that the terms of the parties' agreement were far from clear and that an issue of fact had been presented by Citibank as to whether it could establish—by the proof of custom and usage—an agreed upon though unstated condition making the Deposits subject to Philippine sovereign risk, *i.e.*, the risk that the Philippine government would take action preventing repayment. We decided no legal question.

The case was tried before us without a jury in December 1986. Citibank presented evidence aimed at establishing that Wells Fargo had accepted Philippine sovereign risk and that the Deposits therefore are payable only in Manila and are governed by Philippine law Citibank again asserted that the Decree excused repayment. Wells Fargo—without abandoning its original contention that Citibank had accepted the risk that it would be liable elsewhere for obligations incurred by its Manila branch

—took the position that we need not decide who bears Philippine sovereign risk because the actions of the Philippine government do not excuse honoring the Deposits. In other words, Wells Fargo now contends that it must prevail even if we assume that the Deposits are payable only in Manila and are governed by Philippine law. There being substantial authority for the proposition that the situs of a bank deposit is the branch where the deposit is made and that the depositor's rights are governed by the law of that locality, *cf.*, *e.g.*, *Dunn v. Bank of Nova Scotia* (5th Cir. 1967) 374 F.2d 876, we accept plaintiff's invitation to assume that Philippine law governs this action. We shall further assume that plaintiff can recover only if—and to the extent which—it would have recovered had it instituted this action in an appropriate Philippine tribunal.

Before we delve into Philippine law, a brief digression into banking terminology is necessary. Citibank's receipt of a Eurodollar deposit creates a liability of the bank, since it is equivalent to borrowing. The asset thereby obtained is either loaned out, deposited with another bank or otherwise invested. Although Citibank is an international corporation with worldwide assets and liabilities, it—like most other banks—maintains separate books for each of its branches. In the case of assets carried on the books of its Manila branch, those assets which are invested with entities situated in the Philippines are considered Philippine (or local) assets, while those deposited in banks located outside the Philippines or invested in non-Philippine enterprises are called non-Philippine assets. It is not disputed that the Decree currently prevents Citibank's Manila branch from using its Philippine assets toward repayment of the Deposits. It is further undisputed that Citibank was able to obtain Central Bank permission for its Manila branch to repay foreign depositors to the extent of the non-Philippine assets carried on the books of that branch, which resulted in the partial repayment of $934,000.

The dispute focuses on a third category of assets: assets booked at Citibank's offices outside the Philippines. Citibank concedes that a customer placing a deposit at a foreign branch would be entitled to call upon the bank's worldwide assets should the branch be unable to pay due to illiquidity, theft, fire, or a similar occurrence. It contends, however, that where the law of the country where the branch is located prevents repayment with assets booked at that branch, the depositor may not look elsewhere. As will be developed below, we conclude that Philippine law does not support Citibank's position.

With respect to Philippine law, we are presented with two conflicting affidavits by recognized Philippine authorities: Antonio V. Agcaoili on behalf of the defendant, and Gregorio R. Castillo on behalf of the plaintiff. We find Mr. Castillo's presentation to be far more persuasive and accept his conclusions.

Defendant's expert, Mr. Agcaoili, in an affidavit dated November 28, 1986, states that the Deposits are covered by the Decree, and concludes that the Decree creates a legal impossibility which prohibits Citibank from repaying them without prior Central Bank approval, thus excusing Citibank's performance until the requisite approval is granted (Par. 13). He does not explain how he arrives at these conclusions. He also observes that the Central Bank has not issued any forms or information regarding procedures to be followed in making a request for approval under MAAB 47, and that the lack of such procedures indicates the Central Bank's intention to discourage requests for repayment and not to grant such requests if made (Par. 9).

On the other hand, Mr. Castillo, in his affidavit executed on December 12, 1986, asserts that under Philippine law Citibank is obligated to repay deposits made in its Manila branch with its assets wherever located throughout the world (Par. 4-6), and categorically concludes that the Decree in no way inhibits repayment (in Manila or

anywhere else) of the Deposits as long as Citibank uses assets that are carried on the books of its non-Philippine offices. (Conclusion, Par. 17). The reasoning behind these conclusions is spelled out in Paragraphs 2-6:

> 2. In the case of a deposit booked at the Manila office of a non-Philippine bank such as Citibank, MAAB 47 does not apply to repayment of the deposit with non-Philippine assets. "Non-Philippine assets" are assets that are carried on the books of the bank's non-Philippine offices.
>
> 3. Accordingly, under Philippine law, Citibank may repay the Deposits at issue in this case without prior Central Bank approval, as long as it uses non-Philippine assets for that purpose. (Such repayment may be made through Citibank's branch in Manila or anywhere else in the world).
>
> 4. Under Philippine law, branches of banks are not separate legal entities apart from the bank as an institution. As stated by the Philippine Supreme Court in *National City Bank of New York v. Posadas*, 60 Phil 630 (1934), (affirmed by the United States Supreme Court in *Posadas v. National City Bank of New York* (1936) 296 U.S. 497 [56 S. Ct. 349, 80 L.Ed. 351]):
>
> > "The local branches of the National City Bank of New York have no separate corporate franchise, no separate capital stock, and are controlled directly through officers and managers appointed by the National City Bank of New York . . .
> >
> > A branch is simply an extension of a national bank to foreign countries, [and] the branch of the National City Bank of New York in Manila

> is the National City Bank of New York doing business in Manila."
>
> Accordingly, under Philippine law, obligations incurred at a branch are obligations of the bank as a whole. Citibank, the institution, is the legal entity that entered into the Deposit contracts at issue in this case, not its Manila branch.
>
> 5. Under . . . the Civil Code of the Philippines the obligation of a bank under a deposit contract is not to return the very same funds deposited, but rather to repay funds of the same kind and amount. The funds to repay a deposit need not be funds booked at the same branch that booked the deposit. Rather, under Philippine law a depositor may look to any of the bank's assets, wherever located for repayment of a deposit.
>
> 6. In short, under Philippine law, Citibank's obligation to repay the Deposits is not limited to the assets booked at its Manila branch ("local assets").

Mr. Agcaoili's affidavit, which was dated some two weeks prior to Mr. Castillo's, could not, of course, address itself to these specific observations. We find it significant, however, that Citibank apparently thought it inadvisable to attempt a reply affidavit.

We would not, of course, accept Mr. Castillo's conclusions simply because of Citibank's failure effectively to contest them unless we were satisfied that they are correct. *See*, Fed. R. Civ. P. 44.1. We are so satisfied. Mr. Castillo's first conclusion—that under Philippine law, an obligation incurred by a branch is an obligation of the bank as a whole—is supported by the Philippine authority cited. We know of no Philippine authority to the contrary. The cases from other jurisdictions upon which Citibank relies are inapposite, as they all involve expropriation by a foreign government of a branch's assets, which, under the law of each respective locality, pre-

vented repayment at the situs where the deposit was made. *E.g., Perez v. Chase Manhattan Bank* (1984) 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5, *cert. denied* (1984) 469 U.S. 966, 105 S. Ct. 366, 83 L.Ed.2d 302; *Tillman v. National City Bank* (2d Cir.) 118 F.2d 631, *cert. denied* (1941) 314 U.S. 650, 62 S. Ct. 96, 86 L.Ed. 521; *Dunn v. Bank of Nova Scotia* (5th Cir. 1967) 374 F.2d 876 (limited expropriation by taxation). While these cases could support the proposition that Philippine law controls this action, they shed no light on the question of what the applicable Philippine law may be.

Mr. Castillo's second conclusion—that repayment with Citibank's worldwide assets would not violate the Decree—is sustained by the evidence. The Philippine Central Bank has already specifically allowed Citibank's Manila branch to use its non-local assets in partial discharge of plaintiff's claim (as well as the claims of other foreign depositors). As cogently explained by Rafael Buenaventura, Citibank's Country Corporate Officer in the Philippines during the relevant time period, the essential purpose of the Decree was to prevent the outflow of foreign exchange from the Philippines. The Decree was enacted in response to a severe loss of foreign exchange which threatened the Philippines' ability to import fuel, food, medicines and raw materials, and other items for which foreign exchange is necessary. However, as both Dr. Ian Giddy (Citibank's expert witness as to banking practices) and Mr. Buenaventura testified, the Philippine government's concerns are not implicated by repayment with funds held by banks not domiciled in the Philippines (or, presumably, by calling in loans made to non-Philippine entities). Since these assets are already located outside the Philippines, and therefore are not part of the country's foreign exchange reserves, there is no outflow of foreign currency. Tr. 911-13, 920-921, 1018-19.

Furthermore, plaintiff has presented us with a communication from Philippine authorities specifically dis-

avowing any objection to discharging the remainder of the obligation using funds from Citibank's non-Philippine offices. Pl.Ex. 59. That telex, dated December 14, 1984, states:

> If there is a judgment by a court or an extrajudicial settlement to the effect that a foreign curency [sic] deposit placed with a foreign currency deposit unit ('FCDU') of the Philippine branch of a foreign bank is recoverable from a non Philippine office of such foreign bank and if such liability is satisfied from assets held outside the Philippines and does not result, directly or indirectly, in a net outflow of foreign currency from the Philippines the Central Bank of the Philippines is of the view that the satisfaction of payment of such deposit liability on these terms would not be inconsistent with [the Decree].

The Central Bank's reasoning is obvious: assets carried on the books of Citibank's non-Philippine offices have no connection to the Philippines and are beyond the control of the Philippine government. Mr. Castillo's conclusion that the Decree was not intended to require Central Bank permission for the use of such funds to discharge plaintiff's claim therefore seems wholly reasonable.

In summary, we conclude that under Philippine law Citibank's worldwide assets are available for satisfaction of plaintiff's claim, and that the Decree does not prevent transfer of such assets from outside the Philippines to Manila in order to repay the Deposits. The foregoing conclusion renders irrelevant most of the questions the parties have disputed before us. However, we shall briefly comment on some of them.

Since each party to some extent tried to establish the existence of a custom or practice in international banking which might modify the meaning of their deposit agreement, we shall simply observe that no relevant custom or practice was established by either party.

As indicated in footnote number 2 of our summary judgment opinion, there was dispute between the parties as to whether or not Citibank's Eurodollar deposits earned the same interest if made in secure localities such as London or in presumably riskier places such as Manila. For reasons stated at oral argument, we resolve that issue in plaintiff's favor and find Citibank's Eurodollar interest rate to be identical in all localities.

There was much dispute as to the meaning and impact of Federal Reserve Regulation D, which exempts from reserve requirements a deposit payable only at a foreign branch of a U.S. bank.[1] Foreign branch deposits which are guaranteed by a promise of payment in the United States are subject to federal reserve requirements. Since Regulation D is generally interpreted to exempt Eurodollar deposits from federal reserve requirements, Citibank argued that the regulation demonstrates an understanding in the banking community that such deposits are payable only at the branch where made, and subject to the law of the host country. As we have accepted—for the purposes of this lawsuit—the proposition that the deposits were payable only in Manila and subject to Philippine law, this argument has become moot.

There was also much discussion of the Act of State doctrine. The doctrine applies when judicial consideration of a foreign government's act is likely to have a negative impact upon the executive branch's conduct of international affairs. If adjudication would embarrass or hinder the executive in the realm of foreign relations, the court should refrain from inquiring into the validity of the foreign state's act. *Allied Bank International v. Banco Credito Agricola de Cartago* (2d Cir.) 757 F.2d 516, 520-21, *cert. dismissed* (1985) —— U.S. ——, 106

[1] Federal law provides that depository institutions, such as Wells Fargo and Citibank, are required to set aside reserves equal to a specified portion of the deposits they receive. 12 C.F.R. § 204.1 *et seq.* (1986).

S. Ct. 30, 87 L.Ed.2d 706. In view of our conclusion that neither Philippine law nor policy are in any way offended by the requirement that Citibank repay these Deposits, the Doctrine is in no way implicated.

In relation to Citibank's defense of impossibility of performance, we made a finding at the close of the trial that Citibank had satisfied its good faith obligations to procure the government's consent to the repayment of these deposits. In the light of our interpretation of the Decree, that finding becomes irrelevant. However, if the Decree should be interpreted (as Citibank urges) to require Central Bank permission in order to make payment at the Manila branch with Citibank assets transferred to Manila for that purpose, we would be required to modify our finding. There is nothing in the record to suggest that Citibank made the slightest effort to obtain such consent. On the contrary, everything suggests that approval would have been readily granted if requested. Thus, the impossibility defense would fail even if the Decree were interpreted to require such consent.

In view of the testimony by Citibank's expert witness, Dr. Ian Giddy, to the effect that any decision in this case might give rise to concern in the banking community if it were misconstrued (Tr. 1034-1035) we wish to emphasize the limits of our holding. We deal only with two specific deposits payable in Manila on December 9 and 10, 1983 and governed by the particular Decree we have discussed. We have not considered the law of any other jurisdiction, or what would have happened in Manila had the Philippine government, through taxation or the exercise of any other sovereign power, sought to expropriate any part or all of these Deposits, or if it had sought to confiscate the assets of any depositor or class of depositors, or had in any way impeded or sought to impede the payment of the Deposits with non-Philippine assets to any depositor or class of depositor. Neither have we evaluated the new confirmation slips which we

are told Citibank has begun using since the events here in issue, and we do not speculate as to what effect, if any, they may have on future transactions in the Eurodollar market.

Let the plaintiff submit an appropriate judgment on 10 days notice.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84-Civ.-996 (WK)

WELLS FARGO ASIA LIMITED

v.

CITIBANK, N.A.

July 6, 1987

Judgment of the United States District Court for the Southern District of New York

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Before: WHITMAN KNAPP, District Judge.

JUDGMENT

This action having come on for trial before the Court, Honorable Whitman Knapp, District Judge, presiding, and the issues having been tried and a decision having been duly rendered on May 28, 1987 and the Court concluding that judgment should be entered for plaintiff herein, and the Court directing that plaintiff submit a proposed judgment,

It is ORDERED, ADJUDGED and DECREED that

Plaintiff Wells Fargo Asia Limited recover from defendant Citibank, N.A. the sum of $1,066,000, with interest thereon from the date hereof, at the rate provided by law, plus all costs of this action.

Dated: New York, New York
July 6, 1987

/s/ Whitman Knapp
United States District Judge

APPENDIX H

612 F. Supp. 351

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 84 Civ. 0996 (WK)

WELLS FARGO ASIA LIMITED,
Plaintiff,

v.

CITIBANK, N.A.,
Defendant.

July 2, 1985

Skadden Arps Slate Meagher & Flom by Edwin E. McAmis, New York City, for plaintiff.

Shearman & Sterling by John E. Hoffman, Jr., New York City, for defendant.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

Plaintiff, Wells Fargo Asia Limited, moves for summary judgment for non-payment of certain overdue non-negotiable time deposits placed with the Philippine branch of defendant Citibank.

Plaintiff at all times relevant to this lawsuit was a bank chartered to do business by the government of Singapore and a wholly-owned subsidiary of Wells Fargo Bank, National Association, a federally chartered bank based in San Francisco, California. Citibank is a national bank chartered under the National Bank Act, 12 U.S.C. § 21 *et seq.*, with its corporate headquarters in New York. Citibank has a branch office ("Citibank/Manila") in Manila, the Philippines.

On June 10, 1983 plaintiff placed two six-month non-negotiable U.S. $1,000,000 deposits with Citibank/ Manila. The deposits were to earn interest at the rate of 10% and mature on December 9 and 10, 1983. In October 1983, however, the Philippine government forbade repayment of the principal of certain foreign currency obligations without the prior approval of the Central Bank of the Philippines (the "Central Bank"). Citibank did not receive such approval, and did not repay the deposits on maturity.

Citibank asserts that issues of fact exist pertaining to the parties' understanding of the deposit contract, and whether or not plaintiff assumed the risk that repayment might be affected by Philippine law. Plaintiff has denied having had any understanding that it was assuming this risk and asserts in support of its motion that the deposits bore an unconditional repayment date, that repayment is overdue, and that, as a matter of law, the main office of Citibank is liable for the obligations of its Manila branch.

BACKGROUND

Eurodollar Transactions

At the nub of this case is the treatment to be accorded to a particular kind of time deposit denominated in U.S. dollars which is maintained in a banking institution outside of the United States (the "receiving bank"), commonly called a "Eurodollar" deposit. The case before us presents a deposit of "Asiadollars," or a dollar-denominated deposit made in an Asian country. These transactions in general bear a higher rate of interest than similar transactions within the United States. Thus, at the time plaintiff made the deposits here at issue, domestic banks were granting an interest rate of approximately 8.85%, while Eurodollar (or "Asiadollar") deposits bore an interest rate of about 10%.

The reason for this difference in interest rate is disputed. The parties agree that one of the reasons is that

banks operating abroad are free from the reserve requirements imposed by the Federal Reserve Board and Federal Deposit Insurance Corporation upon banks operating within the United States. In addition, they are in accord that in the event a third person (*e.g.*, a bank robber) or an act of nature (*e.g.*, flood or fire) disabled the branch bank from timely repaying deposits made with it, the main office would assume liability. The parties' view of the Eurodollar market diverges after these two areas of accord, and their differences go to the heart of the propriety of a disposition by summary judgment.

Citibank posits that aside from the category of disabling events mentioned above for which the main office would assume liability, which it terms "credit risk," there also exists a "sovereign risk" for which its main office denies liability. Such sovereign risk results from the acts of the foreign government (*e.g.*, confiscation) in whose jurisdiction the deposits are held which prevent repayment by the foreign-based branch. It suggests that the main office would not bear liability for such acts because the depositor assumes the risk that the foreign government might so act and, in effect, bargains for a higher interest rate in exchange for the risk.

The positions of the respective parties are set forth, on the one hand, in plaintiff's denial of two of Citibank's Requests for Admissions and, on the other hand, in an affidavit submitted by Citibank. The two Citibank requests for admissions (denied by plaintiff) are:

> [Request 2] WF Asia [plaintiff] understood that Citibank's obligation to repay the WF Asia deposits was subject to Philippine law.
>
> [Request 62] In deciding to place the deposits in Manila, WF Asia considered the risk of placing funds in the Philippines and the interest rate Citibank Manila offered to pay on the deposits.

The affidavit submitted by Citibank is that of Ian H. Giddy, a professor of international finance at the New York University Graduate School of Business. Professor Giddy states at ¶ 32 of his affidavit:

> During the course of seminars and conventions with hundreds of international bankers during the past ten years, I have never had occasion to hear a banker deny that Eurodollar deposits are subject to the sovereign risk of the country in which the deposits are placed. Acocrdingly it is inconceivable to me that the staff at [Wells Fargo] Asia responsible for placing the deposits at issue did not understand that these deposits were subject to Philippine sovereign risk.

Professor Giddy explains that the existence of such a "sovereign risk" causes many depositors to place limits on the amount of Eurodollar transactions permitted in a particular bank or country.

He identifies two forms of Eurodollar deposits: negotiable deposits and non-negotiable deposits, sometimes called off-shore deposits. It is the second type of transaction which is here at issue. Because in the case of negotiable deposits (the first type) it is necessary to put potential transferees on notice of the terms of payment, it is apparently standard practice to include a legend on the certificate of deposit to the effect that the instrument is governed by and construed in accordance with the laws of the particular foreign country in which the deposit is held. In the case of non-negotiable deposits, such as those before us, this legend is, the Professor asserts, unnecessary since there are no possible transferees. He asserts, however, that all non-negotiable certificate deposits understand that the same rules apply.

Professor Giddy further teaches that Eurodollar deposits between banks are often arranged through independent brokers which collect information from banks, such as the amount of dollars they are willing to lend

or borrow and the interest rate they seek or are willing to provide. Such information is shared among other potential borrowers or lenders, and the broker matches willing participants.

Payments into and from Eurodollar accounts, which are conducted through an interbank clearing system, are apparently made through telexed instructions to credit and debit demand accounts located in banks in the United States. The bank within the United States at which such demand account is kept is called the "clearing" or "correspondent" bank. This bank does not generate the payment or repayment instructions, which originate instead with the foreign bank on whose behalf the demand account is kept. Professor Giddy maintains that no significance is attached to the identity of the clearing or correspondent bank. Through the affidavit of Donald S. Howard, Executive Vice President and Chief Financial Officer of Citicorp and Citibank, N.A., Citibank asserts that Eurodollar payments are cleared through the main office of Citibank in New York because dollar transactions are cleared through the United States, just as sterling transactions are cleared through London, and franc transactions through Paris.

Mr. Howard's affidavit in addition asserts by reference to a 1973 letter from its former president that it is "Citibank [sic] position that, as an institution, it is responsible for any breach of agreement by an overseas branch but, if the failure to perform is due to such branch's compliance with the law to which it is subject, then the failure does not constitute a breach for which either the branch or the institution as a whole is responsible." Such policy, according to Mr. Howard, was in August 1983 disseminated by the bank's policy manual to Citibank officers around the world.

The Written Deposit Contract

The written contract between plaintiff and Citibank/Manila is made up of several confirmations and computer-

generated telexes among the parties and the independent broker which arranged the deposits, and a statement of "Terms and Conditions" apparently sent to plaintiff after the deposits were placed.[1]

On June 10, 1983, Citibank/Manila indicated to the independent broker that it wished to borrow U.S. dollars that day. The independent broker's confirmation that day designated Citibank/Manila as "Borrower" and plaintiff as "Lender." Payment was to be made to "Citibank, N.A., New York Account Manila." Repayment was directed to "Wells Fargo International, New York Account, Wells Fargo ABIA Asia, Ltd., Singapore Account #003-023645." On June 14th plaintiff confirmed each deposit and instructed Wells Fargo New York ("our correspondent") to pay to Citibank, New York ("customer's correspondent") the required sums. These confirmations were accompanied by computer-generated telexes. Citibank/Manila's telex states:

> Please remit U.S. DLR 1,000,000.00 to our account with Citibank New York. At maturity we remit U.S. DLR 1,050,277.78 to your account with Wells Fargo Bank Intl. Corp. N.Y. through Citibank New York.

Plaintiff's confirmation states:

> We shall instruct Wells Fargo Bk Intl New York to pay to Citibank, N.A. 399 Park Avenue, New York, N.Y. 10022 U.S.A. Please pay to our A/C with Wells Bargo Bk Intl New York.

The independent broker's confirmation reads:

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[1] For the purposes of this motion only, in which we construe the submissions in a light most favorable to the party opposing summary judgment, *see United States v. Diebold, Inc.* (1962) 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L.Ed.2d 176, we treat this statement as though it were part of the contract of deposit.

> Settlement—Citibank N.A. NYK AC Manila Repayment-Wells-Fargo Bk Intl, NYK AC Wells Fargo Asia Ltd SGP No. 003-023645.

Paragraph 6 of the statement of Citibank's Terms and Conditions provides:

> The bank shall have no responsibility for or liability to the undersigned for . . . the unavailability of such funds due to restrictions on convertibility, requisitions, involuntary transfers, distraints of any character . . . or other similar causes beyond the bank's control.

The Philippine Decree

As indicated above, on October 15, 1983, the Philippine government issued a "Memorandum to Authorized Agent Banks" ("MAAB 47") which provided in full:

> Any remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank thru the Management of External Debt and Investment Accounts Department (MEDIAD) for prior approval.
>
> *Accordingly, total obligations to foreign banks/financial institutions as of the end of business hours in New York City on October 14, 1983, shall not be reduced without prior Central Bank approval.*
>
> These measures shall apply to payments value dated during the period October 17, 1983 to January 16, 1984.
>
> Appropriate sanctions shall be imposed on banks which fail to strictly comply with this directive. (Emphasis supplied.)

Raphael Buenventera, a senior vice-president of Citibank and the Country Corporate Officer for Citibank in

the Philippines, has submitted an affidavit dated February 28, 1985 which attests in substance that following receipt of MAAB 47, he engaged in daily discussions with officials of the Central Bank, including three meetings with the governor of that institution who, in response to Mr. Buenventera's questions, "repeatedly and consistently stated that, in accordance with the requirements of [MAAB 47], foreign currency deposits placed by foreign financial institutions with Citibank Manila were frozen and that no payment would be allowed." Affidavit of Raphael Buenventera, ¶ 16. No written demand to permit payment was made prior to the maturity date of the Wells Fargo deposits.

Citibank did not pay plaintiff's deposits when they matured on December 9 and 10, 1983, and on February 10, 1984, plaintiff commenced the instant action. On February 20, 1984 Citibank/Manila applied to the Central Bank for permission to repay certain deposits, which request was granted on March 23, 1984 to the extent of repayment with Citibank/Manila's non-Philippine assets. This amounted to 46% of the sum due plaintiff. Citibank/Manila has continued to pay to the plaintiff the interest due on the remaining sum.

DISCUSSION

The support for plaintiff's position that Citibank, N.A. is liable as a matter of law for the obligations of its branch, regardless of the ability of that branch itself to effect payment, is summed up by our Court of Appeals in *Vishipco Line v. Chase Manhattan Bank, N.A.* (2d Cir. 1981) 660 F.2d 854, 863, *cert. denied* (1982) 459 U.S. 976, 103 S. Ct. 313, 74 L.Ed.2d 291, as follows:

> . . . [I]mpossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity,

> Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch.
>
> * * * *
>
> U.S. banks, by operating abroad through branches rather than through subsidiaries, reassure foreign depositors that their deposits will be safer with them than they would be in a locally incorporated bank.

See Garcia v. Chase Manhattan Bank, N.A. (2d Cir. 1984) 735 F.2d 645; *Sokoloff v. National City Bank* (S. Ct. N.Y. Cty. 1927) 130 Misc. 66, 73, 224 N.Y.S. 102, 114.

While the parties disagree as to the reasons a Eurodollar deposit differs from one made within the United States, there is no dispute that it does. If plaintiff is correct that the holdings in the above-cited cases here apply, then Citibank, N.A. would appear to bear liability for the failure of Citibank/Manila. However, we think it clear that had plaintiff's deposits borne the legend we are informed is routinely inscribed on negotiable Eurodollar deposits, to the effect that the instrument was governed by and was to be construed in accordance with the law of the Philippines, the above-cited cases would not make the home office liable when the branch was disabled from performance because of Philippine law. We therefore find the question before us to be whether the contract should be subjected to proof of an agreed-upon, though unstated, condition to the same effect, based on usage in the Eurodollar trade and the parties' understanding of the deposit terms which derived from such custom.

There are at least two areas in which the parties' interpretations of the terms of their contract vary, and which have material bearing on Citibank's liability. The first is whether the deposits at issue were subject to a "sovereign" risk as it is defined by Citibank. Professor Giddy finds it "inconceivable" that a sophisticated inter-

national bank depositer [sic] would claim ignorance of what he contends are the known rules of the Eurodollar deposit game, the most pertinent of which is that a consideration for the higher interest rate earned by a Eurodollar deposit is the depositer's [sic] agreement to assume a "sovereign risk." Plaintiff denies Citibank's Requests for Admissions that it had an understanding that its deposits were subject to Philippine law. It contends that the higher interest rate is a function solely of the foreign branch bank's freedom from reserve requirements.[2] Related to this dispute is the question whether, assuming Citibank's statement of Terms and Conditions was part of the contract, its disclaimer of liability for the "unavailability of funds due to restrictions on convertibility, requisitions, involuntary transfers, distraints of any character . . . or other similar causes beyond the bank's control" encompassed the Philippine decree.

The second area of disagreement is over Citibank's ability to assert the affirmative defense of the Act of State doctrine.[3] As a threshold matter, the validity of

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[2] Plaintiff makes a cogent argument that the theory propounded by Citibank to explain the higher rate of interest borne by a Eurodollar deposit—that the depositer [sic] assumes a sovereign risk—is considerably undercut by the fact that the higher rate of interest is uniform among countries whose governments might be regarded as more or less "risky" than others. Thus, the Manila deposits here at issue bore the same rate of interest as those placed in London, Frankfurt and Singapore on the same day. Suggestive as this circumstance might be, we believe whether the validity of Citibank's position is thereby undermined is a question for the trier of fact.

[3] Plaintiff maintains that because it does not challenge the validity of the Philippine government's actions pursuant to MAAB 47, but simply relies upon Citibank's liability for the debts of its branch banks under the ruling in *Vishipco Line, supra,* the Act of State doctrine is irrelevant. We do not believe, however, that this holding extends so far. In *Vishipco Line* the doctrine was not applied because it was determined that Vietnam was not the situs of the debt at the time of confiscation. 660 F.2d at 862-63. The court thus did not reach the question whether, assuming that the situs of the debt had been Vietnam, the home office would nonetheless be liable.

that defense turns on whether the debt was located in the Philippines with the result that the purported "taking" effected by MAAB 47 came "to complete fruition within the dominion of the [Philippine] government." *Allied Bank International v. Banco Credito Agricola de Cartago* (2d Cir. 1985) 757 F.2d 516, 521, *quoting Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.* (5th Cir.) 392 F.2d 706, 715-16, *cert. denied* (1968) 393 U.S. 924, 89 S. Ct. 255, 21 L.Ed.2d 260. If the deposit was not located in the Philippines, Citibank's defense would be unavailable. *See Allied Bank International, supra* (defense unavailable to Costa Rican bank which conceded jurisdiction in New York and agreed to pay debt in New York City); *Garcia v. Chase Manhattan Bank* (2d Cir. 1984) 735 F.2d 645 (doctrine inapplicable where bank employee made explicit assurance that debt was repayable in any branch around the world); *Vishipco Line v. Chase Manhattan Bank, N.A.* (2d Cir. 1981) 660 F.2d 854 (Act of State doctrine inapplicable where situs of debt was no longer Vietnam); *but see Perez v. Chase Manhattan Bank, N.A.* (1984) 61 N.Y.2d 460, 471, 474, N.Y.S.2d 689, 463 N.E.2d 5 (even where debt was payable in both United States and Cuba, Cuban government's confiscation gave rise to valid Act of State defense). If it were payable in the Philippines, however, the doctrine might prove successful. *See Braka v. Bancomer* (2d Cir. 1985) 762 F.2d 222 (doctrine applies to non-payment of deposits which on their face indicated that Mexico was the place of deposit and payment). Plaintiff maintains that the computer-generated telexes indicate the deposits were payable (and therefore sited) in New York. Citibank counters that these telexes indicate merely that the New York office was the clearing, or correspondent bank, and that such a bank cannot be deemed the repository of the debt. It asserts that it had no control over whether and when deposits were to be repaid, such instructions necessarily originating from Citibank/Manila.

We have recently been reminded that summary judgment is improper unless the terms of a contractual agree-

ment are wholly unambiguous. *Wards Co., Inc. v. Stamford Ridgway Associates and Trim Fashions, Inc.* (2d Cir. 1985) 761 F.2d 117. Thus, unless plaintiff has demonstrated that the contractual language involved is not "susceptible of at least two fairly reasonable meanings," *id.* at 120, *quoting Schering Corp. v. Home Insurance Co.* (2d Cir. 1983) 712 F.2d 4, 10, "a material issue exists concerning the parties' intent, and the non-moving party has a right to present extrinsic evidence negating the meaning of the contested term." *Wards, supra* at 120; *accord Heyman v. Commerce and Industry Insurance Co.* (2d Cir. 1975) 524 F.2d 1317, 1320. In the instant case, such extrinsic evidence would permissibly encompass evidence of the parties' intent, especially as it derives from custom and usage in the Eurodollar trade.

The authorities cited by plaintiff are not to the contrary. All of them concerned contracts whose terms a reasonable person could not help but understand, in contrast to the enigmatic and sparse phrases which comprise the contract before us. In addition, those cases turned on the fact that the suggested custom or usage did not support the non-moving party's interpretation, *Croce v. Kurnit* (2d Cir. 1984) 737 F.2d 229, 238; *Cable Wiedemer, Inc. v. A. Friederich & Sons, Inc.* (Monroe Cty. 1972) 71 Misc.2d 443, 336 N.Y.S.2d 139, or contradicted what was otherwise a clear and unambiguous term of the contract, *Croce, supra; Kologel Co. v. Down in the Village, Inc.* (S.D.N.Y. 1972) 539 F. Supp. 727 (where person entitled to delivery of goods was explicitly named as "consignee," evidence of trade usage could not modify such designation); *Salzman v. Boyer Products, Inc.* (1st Dept. 1973) 42 A.D.2d 531, 344 N.Y.S.2d 755 (agreement confirming unconditional nature of two loans may not be modified by evidence of oral condition), or was inconsistent with clearly established law. *Avedon v. Exstein* (S.D.N.Y. 1956) 141 F. Supp. 278 (in light of long line of cases to effect that rights to delivered photograph are in cus-

tomer who hired photographer and not in photographer, evidence of custom incompetent to show rights were in photographer); *Colten v. Jackes Marchais, Inc.* (Mun. Ct. 1946) 61 N.Y.S.2d 269 (custom and usage cannot alter law that customer obtains proprietary rights in photo negatives).

We find the words and phrases of the various documents before us far from clear enough to eliminate the possibility that the parties intended to subject these deposits to the same conditions as those of negotiable deposits which, because of their transferability, explicitly bear the proviso that the deposit is subject to the law of the country in which it is placed. Similarly, we are unable conclusively to state that the deposits were not sited in the Philippines. The confirmations and telexes superficially support Citibank's theory that its New York office was the "correspondent" bank for Citibank/Manila, just as Wells Fargo Bank, National Association was the "correspondent" for plaintiff. The ultimate significance or lack thereof to be given these terms will depend on what the trier of fact determines to have been the parties' understanding of them as they were used in the Eurodollar trade. Recognizing that our task on a motion for summary judgment is "issue-finding, not issue-resolution," *United States v. One Tintoretto painting entitled "the Holy Family with Saint Catherine and the Honored Doctor"* (2d Cir. 1982) 691 F.2d 603, 606; *see also Sillman v. Twentieth Century Fox* (1957) 3 N.Y.2d 395, 398, 404, 165 N.Y.S.2d 498, 499, 505 ("issue-finding rather than issue-determination is the key to the procedure"), and finding that Citibank has substantiated the existence of a genuine dispute as to material issues, *see Schering Corp., supra,* 712 F.2d at 9, we deny plaintiff's motion.

Related to Citibank's possible defenses of impossibility of performance and preclusion by the Act of State doctrine is whether Citibank may assert them in the first instance. MAAB 47 did not by its terms prohibit repay-

ment of foreign deposits, but simply required that Central Bank approval be obtained prior to the making thereof. Plaintiff contends that Citibank has not shown that it ever attempted to gain such approval, and therefore cannot raise the decree to shield it from liability. After we expressed our sympathy with this position at oral argument, Citibank submitted the affidavit of Raphael Buenventera, its chief officer in the Philippines, the most persuasive portion of which we find to be his statement that, prior to the maturity date of Wells Fargo's deposits, he inquired into the effect of the decree and was unequivocally told by the Governor of the Central Bank that all foreign payments were "frozen." When the "government or other restraint does not render performance absolutely impossible, it is the duty of the promisor to make a bona fide effort to dissolve and be relieved of the restraint which operates to prevent his performance." *Brown v. J.P. Morgan* (N.Y. Cty. 1941) 177 Misc. 626, 31 N.Y.S.2d 323, 334, *rev'd on other grounds* (1st Dep't 1943) 265 A.D. 631, 40 N.Y.S.2d 229, *aff'd* (1946) 295 N.Y. 867, 67 N.E.2d 263. We believe that a trier of fact could construe Mr. Buenventera's efforts as a "bona fide effort" to obtain approval, and that the response he received demonstrated that his effort had failed. *See Dezsofi v. Jacoby* (N.Y. Cty. 1942) 178 Misc. 851, 36 N.Y.S.2d 672, 674. We thus find a question of fact to exist with regard to the sufficiency of Citibank's efforts to comply with MAAB 47 and its consequent standing to raise any of its affirmative defenses.

It appearing that—at least in the several areas here enumerated—there are factual disputes which may have a material bearing on Citibank's liability, we deny plaintiff's motion for summary judgment. A status conference shall be held in Chambers on September 30, 1985, at 9:30 a.m., to discuss further proceedings in this action.

SO ORDERED.

APPENDIX I

12 U.S.C. § 461(b) (1988)

§ 461. Reserve requirements

(b) Additional definitions . . . reserves related to foreign obligations or assets; exemption for certain deposits . . .

* * * *

(2) (A) Each depository institution shall maintain reserves against its transaction accounts as the Board may prescribe by regulation solely for the purpose of implementing monetary policy—

(i) in the ratio of 3 per centum for that portion of its total transaction accounts of $25,000,000 or less, subject to subparagraph (C); and

(ii) in the ratio of 12 per centum, or in such other ratio as the Board may prescribe not greater than 14 per centum and not less than 8 per centum, for that portion of its total transaction accounts in excess of $25,000,000, subject to subparagraph (C).

(B) Each depository institution shall maintain reserves against its nonpersonal time deposits in the ratio of 3 per centum, or in such other ratio not greater than 9 per centum and not less than zero per centum as the Board may prescribe by regulation solely for the purpose of implementing monetary policy.

(C) Beginning in 1981, not later than December 31 of each year the Board shall issue a regulation increasing for the next succeeding calendar year the dollar amount which is contained in subparagraph (A) or which was last determined pursuant to this subparagraph for the purpose of such subparagraph, by an amount obtained by multiplying such dollar

amount by 80 per centum of the percentage increase in the total transaction accounts of all depository institutions. The increase in such transaction accounts shall be determined by subtracting the amount of such accounts on June 30 of the preceding calendar year from the amount of such accounts on June 30 of the calendar year involved. In the case of any such 12-month period in which there has been a decrease in the total transaction accounts of all depository institutions, the Board shall issue such a regulation decreasing for the next succeeding calendar year such dollar amount by an amount obtained by multiplying such dollar amount by 80 per centum of the percentage decrease in the total transaction accounts of all depository institutions. The decrease in such transaction accounts shall be determined by subtracting the amount of such accounts on June 30 of the calendar year involved from the amount of such accounts on June 30 of the previous calendar year.

(D) Any reserve requirement imposed under this subsection shall be uniformly applied to all transaction accounts at all depository institutions. Reserve requirements imposed under this subsection shall be uniformly applied to nonpersonal time deposits at all depository institutions, except that such requirements may vary by the maturity of such deposits.

* * * *

(6) The requirements imposed under paragraph (2) shall not apply to deposits payable only outside the States of the United States and the District of Columbia, except that nothing in this subsection limits the authority of the Board to impose conditions and requirements on member banks under section 25 of this Act [12 U.S.C. 601 et seq.] or the authority of the Board under section 3105 of this title.

* * * *

APPENDIX J

12 U.S.C. § 601 (1988)

§ 601. Authorization; conditions and regulations

Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Board of Governors of the Federal Reserve System for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, the following powers:

> First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States.

* * * *

APPENDIX K

12 U.S.C. § 632 (1988)

§ 632. Jurisdiction of United States courts; disposition by banks of foreign owned property

Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. Such removal shall not cause undue delay in the trial of such case and a case so removed shall have a place on the calendar of the United States court to which it is removed relative to that which it held on the State court from which it was removed.

Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any Federal Reserve bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any Federal Reserve bank which is a defendant in any such suit may, at any time before the trial thereof, remove such suit

from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. No attachment or execution shall be issued against any Federal reserve bank or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court.

Whenever (1) any Federal Reserve bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to the Federal Reserve bank, the payment, transfer, delivery, or other disposal of such property by such Federal Reserve bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of the Federal Reserve bank for or with respect to such property.

Whenever (1) any insured bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States

has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to such insured bank, the payment, transfer, delivery, or other disposal of such property by such bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property. Any suit or other legal proceeding against any insured bank or any officer, director, or employee thereof, arising out of the receipt, possession, or disposition of any such property shall be deemed to arise under the laws of the United States and the district courts of the United States shall have exclusive jurisdiction thereof, regardless of the amount involved; and any such bank or any officer, director, or employee thereof which is a defendant in any such suit may, at any time before trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

Nothing in this section shall be deemed to repeal or to modify in any manner any of the provisions of the Gold Reserve Act of 1934, as amended, the Silver Purchase Act of 1934, as amended, or subdivision (b) of section 5 of the Act of October 6, 1917, as amended, or any actions, regulations, rules, orders, or proclamations taken, promulgated, made, or issued pursuant to any of such statutes. In any case in which a license to act with respect to any property referred to in this section is required under any of said statutes, regulations, rules, orders, or proclamations, notification to the Secretary of State by the proper Government officer or agency of the issuance of an appropriate license or that appropriate licenses will be issued

on application shall be a prerequisite to any action by the Secretary of State pursuant to this section, and the action of the Secretary of State shall relate only to such property as is included in such notification. Each such notification shall include the terms and conditions of such license or licenses and a description of the property to which they relate.

For the purposes of this section, (1) the term "property" includes gold, silver, currency, credits, deposits, securities, choses in action, and any other form of property, the proceeds thereof, and any right, title, or interest therein; (2) the term "foreign state" includes any foreign government or any department, district, province, county, possession, or other similar governmental organization or subdivision of a foreign government, and any agency or instrumentality of any such foreign government or of any such organization or subdivision; (3) the term "central bank" includes any foreign bank or banker authorized to perform any one or more of the functions of a central bank; (4) the term "person" includes any individual, or any corporation, partnership, association, or other similar organization; and (5) the term "insured bank" shall have the meaning given to it in section 12B of this Act.

APPENDIX L

12 U.S.C. § 1813 (1988 & Supp. I 1989)

§ 1813. Definitions

As used in this chapter—

* * * *

(d) DEFINITIONS RELATING TO MEMBER BANKS.—

(1) NATIONAL MEMBER BANK.—The term "national member bank" means any national bank which is a member of the Federal Reserve System.

(2) STATE MEMBER BANK.—The term "State member bank" means any State bank which is a member of the Federal Reserve System.

* * * *

(*l*) The term "deposit" means—

* * * *

(5) such other obligations of a bank or savings association as the Board of Directors, after consultation with the Comptroller of the Currency, Director of the Office of Thrift Supervision, and the Board of Governors of the Federal Reserve System, shall find and prescribe by regulation to be deposit liabilities by general usage, except that the following shall not be a deposit for any of the purposes of this chapter or be included as part of the total deposits or of an insured deposit:

(A) any obligation of a bank or savings association which is payable only at an office of such bank or savings association located outside of the States of the United States, the District of Columbia, Puerto Rico, Guam, American Somoa, the Trust Territory of the

Pacific Islands, the Virgin Islands, and the Northern Mariana Islands; and

(B) any international banking facility deposit, including an international banking facility time deposit, as such term is from time to time defined by the Board of Governors of the Federal Reserve System in regulation D or any successor regulation issued by the Board of Governors of the Federal Reserve System.

* * * *

APPENDIX M

12 C.F.R. § 204.2(t) (1991)

(t) "Any deposit that is payable only at an office located outside the United States" means (1) a deposit of a United States resident [12] that is in a denomination of $100,000 or more, and as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States or (2) a deposit of a person who is not a United States resident [12] as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States.

---

[12] A deposit of a foreign branch, office, subsidiary, affiliate or other foreign establishment ("foreign affiliate") controlled by one or more domestic corporations is not regarded as a deposit of a United States resident if the funds serve a purpose in connection with its foreign or international business or that of other foreign affiliates of the controlling domestic corporation(s).

APPENDIX N

12 C.F.R. § 204.128 (1991)

§ 204.128 Deposits at foreign branches guaranteed by domestic office of a depository institution.

(a) In accepting deposits at branches abroad, some depository institutions may enter into agreements from time to time with depositors that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment. The question has arisen whether such deposits are subject to Regulation D, and this interpretation is intended as clarification.

(b) Section 19 of the Federal Reserve Act which establishes requirements does not apply to deposits of a depository institution "payable only at an office thereof located outside of the States of the United States and the District of Columbia" (12 U.S.C. 371a; 12 CFR 204.1(c)(5)). The Board rule in 1918 that the requirements of section 19 as to reserves to be carried by member banks do not apply to foreign branches (1918 *Fed. Res. Bull.* 1123). The Board has also defined the phrase "Any deposit that is payable only at an office located outside the United States," in § 204.2(t) of Regulation D, 12 CFR 204.2(t).

(c) The Board believes that this exemption from reserve requirements should be limited to deposits in foreign branches as to which the depositor is entitled, under his agreement with the depository institution, to demand payment only outside the United States, regardless of special circumstances. The exemption is intended principally to enable foreign branches of U.S. depository institutions to compete on a more nearly equal basis with banks in foreign countries in accordance with the laws and regulations of those countries. A customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located

might impose restrictions on withdrawals. When payment of a deposit in a foreign branch is guaranteed by a promise of payment at an office in the United States if not paid at the foreign office, the depositor no longer assumes this risk but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the depository institution. To assure the effectiveness of Regulation D and to prevent evasions thereof, the Board considers that such guaranteed foreign-branch deposits must be subject to that regulation.

(d) Accordingly, a deposit in a foreign branch of a depository institution that is guaranteed by a domestic office is subject to the reserve requirements of Regulation D the same as if the deposit had been made in the domestic office. This interpretation is not designed in any respect to prevent the head office of a U.S. bank from repaying borrowings from, making advances to, or supplying capital funds to its foreign branches, subject to Eurocurrency liability reserve requirements.

APPENDIX O

46 Fed. Reg. 27,090 (1981)

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12 CFR Parts 204 and 217

[Regulations D and Q; Docket No. R-0358]

Federal Reserve Requirements and Interest Rate Ceilings; Deposits Payable Outside the United States

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rules.

SUMMARY: The Board of Governors of the Federal Reserve System has amended its Regulation D—Reserve Requirements of Depository Institutions (12 CFR Part 204) and Regulation Q—Interest on Deposits (12 CFR Part 217) to subject deposits in denominations of less than $100,000 maintained at foreign branches to interest rate ceilings and reserve requirements. This action is taken in light of recent offerings that has significant potential adverse implications for the viability of the existing interest rate ceiling structure, the flow of funds among depository institutions, and the conduct of monetary policy.

EFFECTIVE DATE: May 14, 1981.

FOR FURTHER INFORMATION CONTACT: Gilbert T. Schwartz, Associate General Counsel (202/452-3625) or Paul S. Pilecki, Senior Attorney (202/452-3281), Legal Division, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

SUPPLEMENTARY INFORMATION: In recent days the Board has become aware of a deposit arrangement involving the use of foreign offices of depository institutions that can be used by such institutions to evade the reserve requirements of Regulation D (12 CFR Part 204) and the interest rate ceilings of Regulation Q (12 CFR

Part 217). If allowed to proliferate, the arrangement would erode the effectiveness of reserve requirements and interest rate limitations on deposits. In order to preserve the effectiveness of Federal reserve requirements and interest rate ceilings, the Board has determined that it is essential to subject such arrangements to Regulations D and Q, effective immediately if the deposits are in denominations of less than $100,000. Under the account arrangement, the institution establishes accounts in denominations of less than $100,000 through its U.S. offices on behalf of its foreign office. Customers may direct the institution to transfer funds to the institution's foreign office for deposit in an account at the foreign office or direct the foreign office to transfer funds from the foreign office account to the customer's checking account at a U.S. office of the institution. Transfers may be effectuated by telephone or by other instruction. The account agreement provides that amounts on deposit in the foreign office account are payable only at the foreign office.

The Board has determined that funds deposited in the foreign office account arrangement described above and other arrangements involving the receipt of deposits at foreign offices that would otherwise likely be maintained in the United States should be subjected to deposit interest rate limitations under Regulation Q—Interest on Deposits (12 CFR Part 217) and to reserve requirements under Regulation D—Reserve Requirements of Depository Institutions (12 CFR Part 204) if they are in denominations of less than $100,000. In this connection, the Board has amended Regulations D and Q to provide that deposits will be regarded as payable outside the United States if the depositor has a right to demand payment only outside the United States and only if the deposit is in denominations of $100,000 or more.

The Board believes that arrangements of the type described above serve no purpose other than as devices to evade Regulations D and Q. The account does not facilitate the conduct of the foreign office's or the customer's foreign business, and the depositor has no interest in

maintaining funds in a foreign office other than as a device to obtain a rate of interest in excess of Regulation Q ceilings. The Board regards the foreign office involvement in such transactions as being limited to serving as an accounting convenience.

Under section 19 of the Federal Reserve Act, a deposit that is payable only outside the United States is not subject to basic reserve requirements (12 U.S.C. 461(b)(6)), interest rate limitations (12 U.S.C. 371b) or to the prohibition against payment of interest on demand deposits (12 U.S.C. 371a). The purpose of this exemption is to enable foreign branches of U.S. banks to compete on a more nearly equal basis with foreign banks.[1] The Board believes that foreign office accounts in denominations of less than $100,000 do not serve to further the competitive position of the foreign office *vis a vis* foreign banks and, thus, such accounts are not entitled to the exemptions in section 19. Moreover, Congress has expressed its will that rate ceilings on deposits of less than $100,000 should continue in effect until April 1, 1986, unless eliminated sooner by the Depository Institutions Deregulation Committee.[2] Proliferation of arrangements such as those described above could abrogate the effectiveness of the interest rate ceiling structure, thereby presenting potential adverse implications for the flow of funds among depository institutions and provide an unfair competitive advantage to U.S. banks with foreign offices relative to depository institutions that do not maintain foreign branches. These arrangements also could have an adverse impact on the conduct of monetary policy. Consequently, the Board believes that if an institution subject to Regulations D and/or Q desires to accept deposits of less than $100,000 at a foreign office, such deposits must comply with all provisions of Regulations D and/or Q.

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[1] See 35 FR 2768 (February 10, 1970) and Senate Report No. 1260, 73D Congress, 2d Session, June 6, 1934 (pp. 4, 6).

[2] Section 202 of the Depository Institutions Deregulation Act of 1980 (Pub. L. 96-221).

In considering this matter, the Board noted that the purpose of foreign branches of U.S. banks is to conduct a foreign and international business and not to function as a substitute for domestic banking facilities. However, the Board is concerned with the ability of U.S. depository institutions to compete with nondepository institutions and recognizes that additional instruments may be needed in order to foster additional competition. The Board notes that the Depository Institutions Deregulation Committee may consider the possibility of creating new deposit instruments that would enhance the competitive position of depository institutions at its next meeting in connection with its consideration of the Committee's proposal to deregulate rate ceilings on deposits.

The Board believes that adoption of these amendments effective immediately is necessary in order to assure the effectiveness of reserve requirements and interest rate ceilings. Consequently, the Board, for good cause, finds that the notice and public procedure provisions of 5 U.S.C. § 553(b) with regard to this action are impracticable and contrary to the public interest, and that deferral of the effective date pursuant to 5 U.S.C. § 553(d) would be inconsistent with the effective enforcement of Regulations D and Q.

In view of the Board's finding that the amendments should be adopted immediately, notice of proposed rulemaking is not required by 5 U.S.C. § 553. Accordingly, section 603 and 604 of the Regulatory Flexibility Act (5 U.S.C. 603 and 604) are not applicable. However, the Board notes that its action will bolster the ability of small depository institutions, which do not have foreign branches, to compete for deposits with large institutions with foreign branches.

Effective May 14, 1981, pursuant to the Board's authority under § 19(a) of the Federal Reserve Act (12 U.S.C. 461(a)) to define the terms used in that section

and to prescribe such regulations as the Board may deem necessary to effectuate the purposes of § 19 and to prevent evasions thereof, the Board amends Regulations D (12 CFR Part 204) and Q (12 CFR Part 217) as follows:

[Text of Regulations omitted]

By order of the Board of Governors, May 14, 1981.

Theodore E. Allison,

Secretary of the Board.

[FR Doc. 81-14962 Filed 5-15-81; 10:00 am]

APPENDIX P

SUPREME COURT OF THE UNITED STATES

No. A-177

CITIBANK, N.A.,

Petitioner

v.

WELLS FARGO ASIA LIMITED

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 24, 1991.

/s/ Thurgood Marshall
THURGOOD MARSHALL
Associate Justice of the Supreme Court
of the United States

Dated this 12th day of September, 1991.

(2)

No. 91-689

Supreme Court, U.S.
FILED
NOV 22 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITIBANK, N.A.,

Petitioner,

v.

WELLS FARGO ASIA LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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November 22, 1991

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IN THE

Supreme Court of the United States

October Term, 1991

No. 91-689

CITIBANK, N.A.,

Petitioner,

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WELLS FARGO ASIA LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This brief is filed by consent of the parties pursuant to Rule 37.2.

Interest of *Amici Curiae*

The New York Clearing House Association (the "Clearing House") is an association of twelve leading commercial banks in the City of New York.[1] It clears

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank and Republic National Bank of New York.

commercial drafts and items in the New York area and operates two electronic payment systems, including CHIPS, the functioning of which lies at the heart of this litigation (*see* 13a-14a).[2] As of year-end 1990, of the total of 794 branches operated in foreign countries by all United States banks that are members of the Federal Reserve System, 418 were operated by Clearing House banks, and the total deposit liabilities in all currencies of the Clearing House member banks' foreign branches exceeded $150 billion. The Clearing House regularly appears as an *amicus curiae* in cases raising significant questions of law relating to banking.

The Institute of International Bankers is an association of more than 240 foreign banks, from over 50 countries, with operations in the United States. One of the Institute's principal objectives is to present the views of foreign banks operating in the United States on issues of federal and state laws and policies affecting those operations. To this end, the Institute has participated by filing briefs *amicus curiae* in cases raising significant legal issues that affect the United States operations of foreign banks.

The member banks of the *amici* organizations include most of the principal participants in international banking. The banks place and accept United States dollar deposits, commonly referred to as Eurodollar deposits, at thousands of locations outside the United States. Virtually all such deposits of any size are settled and cleared by these banks through CHIPS in New York.

Although the member banks of the *amici* have widely divergent economic interests as Eurodollar depositors or depositaries—and, indeed, various of them have substan-

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[2] Citations in the form "—a" are to the Appendix to the Petition.

stantial sums of blocked funds on deposit at Citibank/ Manila—they have a common and fundamental interest in the recognition and consistent application of clear and certain rules of law to the field of international banking. Because the decision below represents a radical departure from settled law that could cause considerable turmoil in the practice of international banking, *amici* urge its review and reversal by this Court.

Summary of Argument

The decision below would impose new liabilities with respect to hundreds of billions of dollars of interbank Eurodollar deposits based merely on the use for administrative convenience of routing instructions calling for the remittance of such deposits at maturity through New York correspondent banks via CHIPS. This Court having held that there was no basis in contract for such a result, the court of appeals has now found such a basis in the law of New York. The present decision presents the same conflict with federal law and policy and threatens the same untoward commercial consequences as did the earlier decision of the court of appeals. Both the process by which the decision was reached and its practical impact on federal banking regulation and international banking warrant review by this Court.

ARGUMENT

We shall not burden the Court by recanvassing the matters presented in the petition and in the prior submissions of Citicorp, the Solicitor General and these *amici*. Our February 24, 1989 brief in support of the petition in No. 88-1260 ("1989 Brief") and our January 18, 1990 brief on the merits ("1990 Brief") contain a full

discussion of the Eurodollar market, the CHIPS system and their roles in international finance and commerce, as well as the applicable law. We shall revisit those subjects only to the extent necessary in the context of the limited points we make here, which highlight the appropriateness of plenary consideration of this case.

A. The court of appeals answered the questions remanded to it for determination "in the first instance" (23a-24a) by holding that New York law applies and permits WFAL to collect its Manila deposits from Citibank in New York (6a-9a), thereby ignoring this Court's tactful suggestion that New York law seemed unlikely to call for such a result (*see* 24a). The court of appeals further held that the rule of New York law it fashioned did not conflict with federal bank regulatory law on the theory that federal law treats foreign branch deposits as noncollectible in the United States only if the deposit agreement expressly so provides (10a). In reaching this conclusion, the court of appeals apparently ignored entirely the representations of the Solicitor General, made on behalf of every responsible federal department and agency, that federal regulation is premised on the contrary view that under the branch-situs rule (*see* 32a) foreign branch deposits are, as a matter of law, collectible only abroad absent an express agreement guaranteeing collectibility in the United States.

B. The court of appeals predicated its holding at least in part on the customary settlement and clearance of Eurodollar transactions in New York through New York correspondent banks (7a), thus again attributing substantial decisional significance to the use of CHIPS and to the CHIPS routing instructions that this Court had already held did not, as a matter of contract, call

for collection in New York (21a-23a).[3] In relying on the use of New York correspondents to settle and clear as a basis for permitting collection, the court of appeals has completely eviscerated the branch-situs rule for large Eurodollar deposits and has made collectible in New York billions of dollars not booked in New York by the deposit-receiving institutions. The court of appeals did not discuss the public and commercial consequences of the result it reached, as presented to the court by the Solicitor General and these *amici*.

C. As we have previously advised the Court, the rule announced by the court of appeals severely burdens the international financial system and the United States banking system in particular:

1. Eurodollars play a critical role in international commerce due to the acceptance of the dollar as the principal currency of exchange among nations (1990 Brief 9-12). Eurodollar depositaries outside the United States—be they foreign banks or foreign branches of United States banks—have *never* treated those deposits as sited in New York and thus subject to collection in New York irrespective of their collectibility at the place of deposit. If the rule announced by the court of appeals is allowed to stand, there will be a disincentive to accept dollar deposits in countries presenting any perceived risk of government

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[3] Given the particular meaning of the locus of "repayment" as used by the district court—"the location where the wire transfers effectuating repayment at maturity were to occur" (17a), this Court distinguished the locus of "repayment" in this sense from the locus of "collection," *i.e.*, the place where WFAL "could collect" if "Citibank/Manila failed to remit payment upon maturity" (22a). The court of appeals effectively remerged these concepts as a matter of law.

action affecting remittances, interfering with the flow of funds in international commerce (*see* 1989 Brief 13-15).

2. United States banks at least, and perhaps foreign banks doing business in New York (*see* 7a-8a), will face new liabilities on account of foreign branch deposits, placing additional burdens on their capital and disadvantaging them in the Eurodollar market. The magnitude of these liabilities is massive: total dollar obligations of foreign branches of United States banks alone (excluding amounts due to affiliates) exceed $150 billion. 77 FED. RES. BULL. A56 (Nov. 1991).

3. Countries wishing to act adversely to the United States will have a ready road map to do so—they need only freeze the branch assets of our banks, disclaim any effect on depositors' rights (*see* 8a) and send the depositors here to collect. To state this result is to show its absurdity: no nation would make its banking system hostage by giving effect in its own courts to such action by a foreign government.

D. The decisional process of the court of appeals evades the purport of this Court's prior decision, disregards the Solicitor General's representations as to the reality of federal bank regulation, ignores the practical consequences of its choice of a rule of decision for United States banks engaged in international banking, and creates a New York common-law rule adverse to the interests of both New York and the United States. It is remarkable in its abstraction of legal rules from the reality of the world in which they are to be applied and in its postulation of a lack of conflict with federal law through intellectual sleight of hand. The Court recognized in its previous grant of *certiorari* that this case presents important questions of federal law and federalism; in its present

posture it warrants review again not only on that ground but by reason of the supervisory considerations adverted to in the last clause of Rule 10.1(a).

CONCLUSION

For the reasons stated herein, in the Petition and in the prior submissions of Citibank, the United States and these *amici, certiorari* should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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(3)

No. 91-689

In The

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October Term 1991

CITIBANK, N.A.,

Petitioner,

vs.

WELLS FARGO ASIA LIMITED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

Pursuant to this Court's Rule 15.1, we point out that Petitioner's statement of the question presented is erroneous. Petitioner's statement asserts that the Philippine decree prevented its Manila branch from repaying WFAL's deposits, but this is incorrect. Philippine law merely requires Citibank to seek permission to repay, and only applies to its Manila branch assets. As this Court held, Philippine law does not prevent Citibank from repaying the deposits with its non-branch assets. 495 U.S. 660, ___, 110 S.Ct. 2034, 2039 (1990). Accordingly, the questions actually presented are these:

1. In the absence of an agreement to the contrary, where the application of state law provides that Citibank's obligation to repay WFAL's deposits is not limited to its branch assets, is there existing federal law that preempts the enforcement of state law and, if not, should this Court, rather than Congress or the Federal Reserve Board, decide whether to create federal law that would retroactively relieve Citibank of liability for its failure to repay the deposits.

2. When the Court of Appeals' alternative holding is based upon an independent state ground, should this Court undertake to create or find federal law, when it is clear that this action would not alter the outcome of this case?

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BRIEF FOR RESPONDENT IN OPPOSITION[1]

When this case was last before this Court, the Chief Justice observed:

> Upon reading the opinion of the Court in this case, one may fairly inquire as to why certiorari was granted. The opinion decides no novel or undecided question of federal law, but simply recanvasses the same material already canvassed by the Court of Appeals and comes to a different conclusion than that court did. I do not believe that granting plenary review in a case such as this is a wise use of our limited judicial resources.

Citibank, N.A. v. Wells Fargo Asia Ltd., 495 U.S. 660, ___, 110 S. Ct. 2034, 2042 (1990) ("WFAL S. Ct.")[2] App. 25a.[3] Indeed, the initial issue put to Judge Bork at the oral argument concerned the observation that the Court does

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[1] Pursuant to Rule 29.1, WFAL lists the following related corporations. Wells Fargo & Company is the parent of respondent. Its stock is publicly traded. The only arguable subsidiaries or affiliates whose stock may be publicly held are Shanghai Commercial Bank and Harpur Holdings, Ltd.

[2] We refer to the two opinions of the district court, 660 F. Supp. 946 (S.D.N.Y. 1987) and 695 F. Supp. 1450 (S.D.N.Y. 1988), as WFAL I and WFAL II, respectively. The two opinions of the Court of Appeals, 852 F.2d 657 (2d Cir. 1988) and 936 F.2d 723 (2d Cir. 1991), are designated WFAL 2d Cir. I and WFAL 2d Cir. II, respectively.

[3] "App." refers to the Appendix to the Petition; "Resp. App." refers to the Appendix to this Opposition; "Pet." refers to the Petition; and "J.A." refers to the Joint Appendix filed February 20, 1990 with this Court in WFAL S. Ct. In each case, page numbers follow.

not usually review these kinds of "factual determinations." Transcript of Oral Argument, No. 88-1260 (March 19, 1989) (hereinafter "March 19, 1989 Tr.") 4-5.[4] There is even less reason to review this case a second time.

There is nothing in Citibank's latest petition which makes this appeal certworthy. This is a simple contract dispute between private parties governed by New York law. The latest Court of Appeals opinion cures the infirmities of the earlier appellate decision. This Court previously reversed the Court of Appeals on the basis that "the factual premise on which the Second Circuit relied in deciding the case contradicts the factual determinations made by the District Court, determinations that are not clearly erroneous." App. 18a. On remand, the Court of Appeals once again unanimously affirmed the judgment in WFAL's favor, although this time "substantially for the reasons [the trial court] stated." WFAL 2d Cir. II, App. 7a-9a. Accordingly, the latest Court of Appeals decision is in complete harmony with the trial court's findings.

No one disputes any longer that "Philippine law does not bar the collection of WFAL's deposits from the general assets of the Citibank in the State of New York." App. 19a. Nor does this case raise any novel or undecided issue of federal law. Citibank's obligation to repay is not limited to the assets of the Manila branch, and its failure to repay would not be excused even if these assets were

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[4] At least one scholar reached a somewhat similar conclusion when commenting on this Court's prior decision: "[a]re all of these foreign branch sovereign-risk-to-deposit cases fundamentally first year law school contracts cases?" E. Symons and J. White, *Banking Law* 781, 788 (3d Ed. 1991).

blocked. Put another way, state law permits collection of the debt in New York and nothing in the contract varies that law.

To evade this result, Citibank invites the Court to create a new federal common law, a jurisprudential enterprise properly limited to the most extraordinary of situations. This is not one of them. As the Court of Appeals concluded, there is no inconsistency between state law and the federal policies invoked by Citibank. Citibank contends "that there is a clear federal policy placing the risk of foreign-law impediments to repayment on the depositor." WFAL 2d Cir. II, App. 9a. However, the provisions of the federal regulations upon which Citibank relies do not even purport to govern the terms of the legal relationship between banks and their depositors, including the allocation of sovereign risk. Rather, they expressly provide that allocation of risk is determined by the agreements between the parties. *Id.* at App. 10a.

In any event, there is no need to answer Citibank's call for federal common law. The Court of Appeals found an independent basis for judgment in WFAL's favor, which moots the so-called "federal" question. The Philippine moratorium, MAAB 47 (the "Decree"), *see* J.A. 145-157, does not flatly prohibit repayment of deposits; it merely requires prior approval of the Philippine Central Bank. Citibank failed to seek such approval. It now argues that it should be excused from that failure on the speculation that approval would have been denied if sought. However, the Court of Appeals held that under applicable law Citibank's failure precludes it from invoking the doctrine of impossibility to relieve it from repayment. WFAL 2d Cir. II, App. 11a.

The Court of Appeals also took note of recent evidence (undisputed by Citibank) which belies Citibank's claim that the Philippine government would have withheld approval. Over the last several years, Citibank has sought, and *received*, approval enabling it to transfer over $160 million[5] in Philippine assets as "profits" from its Manila branch to its home office. WFAL 2d Cir. II, App. 10a-11a; Resp. App. 1a. Citibank not only failed to reveal these facts when the case was last before this Court, it fails to mention them in its petition even though these developments were important to the Court of Appeals' decision.

Nothing in petitioner's essay about federal common law can disturb this aspect of the Court of Appeal's holding. Even if this Court were to create a new federal common law limiting Citibank's repayment obligation to its Philippine assets, Citibank's failure to seek approval to repay with these assets eviscerates its "impossibility" defense. This Court does not ordinarily review judgments based on an independent state ground. *Henry v. State of Mississippi*, 379 U.S. 443, 446 (1965). The case is fact-bound. No federal question is presented and the petition should be denied.

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[5] While the Court of Appeals' opinion refers to *at least* $25 million in Citibank's repatriated profits from 1984-1989, the actual figure is over $160 million for this period. See Resp. App. 1a.

STATEMENT OF THE CASE

In June of 1983, WFAL placed two $1 million (U.S.) deposits with Citibank, N.A. which were booked at Citibank's Manila branch. J.A. 19, 20. Before the deposits matured, the Philippine government issued the Decree which, according to Citibank, appeared to prevent it from liquidating loans it had made to Philippine borrowers and using the proceeds to repay deposits without obtaining Central Bank approval. WFAL I, App. 54a. Citibank then refused to repay, arguing that its depositors "understood" that its repayment obligation was limited to the assets of its Manila branch.

As the trial court observed, however, Citibank "must have known that its depositors were not taking any sovereign risk, or didn't think they were." J.A. 36; *see also* J.A. 314-316. Citibank "jealously guarded – almost like a trade secret – its belief that everybody was taking sovereign risk." J.A. 37; *see also* J.A. 262-264 (Howard); J.A. 246-248 (Schmidt). The interest rate paid by Citibank in Manila was the same as that paid at less risky locations, such as London and Frankfurt. WFAL I, App. 60a. Expert witnesses called by both Citibank and WFAL testified that this interest rate did not include any premium for sovereign risk. J.A. 271-272 (Dufey); J.A. 377-378 (Giddy). When Citibank finally informed its depositors of its position after the Decree was imposed, they reacted, in Judge Knapp's words, with "outrage and despair." J.A. 354.

The 1986 trial proceeded in reliance on Citibank's representation that the Decree had "frozen" its Philippine assets. Citibank repeated this statement to both the Court of Appeals and to this Court. *See, eg.*, Citibank November

16, 1987 2d Cir. Brief 10-12; Citibank January 25, 1989 Petition 5-6.

Last fall, for the first time, WFAL discovered that this statement is untrue. Audited financial statements of Citibank's Manila branch from 1985 through 1989 disclose that the Manila branch has transferred to its home office as "profits" over $160 million of the very assets Citibank has been claiming are "blocked" by the Decree.[6] When confronted with this information, Citibank admitted to the Court of Appeals that the branch has remitted "profits" of over $160 million to the home office. *See* WFAL 2d Cir. II, App. 11a; Citibank December 5, 1990 Reply Brief 19-20 n. 18; *see also* Citibank February 4, 1991 Memorandum 2, 5-6.

Unaware of Citibank's secret scheme of profit repatriation, the district court concluded that (1) "New York law should be used to evaluate Wells Fargo's contention that Citibank's *worldwide* assets are available for repayment," WFAL II, App. 44a (emphasis added), (2) since there was no agreement limiting Citibank's obligation to repay to the use of Philippine assets, as a matter of New York law "Citibank is liable for the debt of its Manila branch and plaintiff is entitled to look to Citibank's worldwide assets for satisfaction of its deposits," WFAL II, App. 47a, and (3) "having failed to request approval, Citibank's impossibility defense must fail." WFAL II, App. 47a.

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[6] The financial statements had been filed by Citibank with the Philippine Securities and Exchange Commission. Respondent's exhibit at Resp. App. 1a summarizes the results shown on these statements.

The Court of Appeals affirmed the trial court's holding. WFAL 2d Cir. I, App. 27a. However, as this Court noted, it was ". . . unclear from the opinion of the Court of Appeals which law it found to be controlling." WFAL S. Ct., App. 23a-24a. Accordingly, this Court ". . . decide[d] to remand the case for the Court of Appeals to determine which law applies, and the content of that law," *id.*, App. 24a, and more specifically whether the trial court was correct in holding that ". . . collection [from Citibank's general assets] is permitted . . . by rights and duties implied by law." *Id.*, App. 23a.[7]

In short, the Court of Appeals has now concurred in the trial court's conclusions "substantially for the reasons [the trial court] stated," both that New York law is controlling and that this law provides that a "parent bank is ultimately liable for the obligations of [a] foreign branch." WFAL 2d Cir. II, App. 7a-9a. This conclusion is amply supported by precedent. *Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, *cert. denied*,

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[7] Justice Stevens dissented, indicating that in his view the law on this subject is quite clear. Noting that Citibank had conceded it was obligated to use non-Philippine assets if the Philippine branch could not pay because of "insolvency . . . or by an act of God," and that "Citibank argues that only the so-called 'sovereign risk' is excluded from its undertaking to repay the deposits out of its general assets," Justice Stevens wrote that, "[i]n my opinion such a specific exclusion from a general undertaking could only be the product of an express agreement between the parties. The District Court's finding that no such specific agreement existed is therefore dispositive for me." WFAL S. Ct., App. 25a-26a. The latest Court of Appeals opinion is in agreement with this approach. WFAL 2d Cir. II, App. 10a.

469 U.S. 966 (1984), citing *Sokoloff v. National City Bank of New York*, 239 N.Y. 158, 145 N.E. 917 (1924). *Accord, Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S. Ct. 2602 (1990); *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982). Thus, where, as here, a foreign sovereign prevents or restricts a branch from using its assets to repay, the bank remains obligated to do so (absent an explicit agreement to the contrary). For, as noted by Justice Cardozo when addressing an earlier claim by Citibank,

> If [Citibank's] defense were to prevail, the loss sustained by [Citibank] through [its] unfortunate investments [in Russia] would be shifted from itself and cast on its depositors.

Sokoloff v. National City Bank of New York, 239 N.Y. 158, 145 N.E. 917 (1924). Citibank does not challenge these holdings or even discuss the *Sokoloff* case; Citibank, therefore, admits that WFAL may collect these deposits under state law.

On appeal, Citibank advanced a new argument that "clear federal policy" demands that federal common law be created that would retroactively excuse repayment and put sovereign risk on the depositor. The Court of Appeals declined, noting that under federal banking regulations, the status of a deposit (*i.e.*, whether it is to be exempt from reserves, insurance assessments and the like because it is "payable only outside the United States") depends upon whether ". . . the depositor is entitled, *under the agreement with the institution*, to demand payment *only* outside the United States." (Court's emphasis.) WFAL 2d Cir. II, App. 10a. The Court of Appeals then

concluded that as long as state law does not restrict the parties' ability to allocate risk by agreement, there is no "significant conflict" between state law and federal policy "such as would be necessary to justify the creation of a federal common law." *Id.*, citing *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31 (1977).

REASONS FOR DENYING THE WRIT

In its most recent Petition, Citibank continues to argue in the alternative that (a) there is an existing federal law contained "in numerous federal statutes and regulations" that "preempts" local law and that limits its repayment obligation to the assets of its Manila branch, or (b) if there is no such existing law, this Court should reach out and create new federal "common law" that would limit its obligation. Section I shows that there is no such existing law. Section II shows that there is no conflict between federal law or policy and state law which would warrant either preemption or the creation of federal common law. Finally, Section III shows that Citibank's "impossibility" defense must necessarily fail – regardless of whether Citibank's obligation is limited to its Philippine assets – since it is now clear that Citibank has been transferring profits from Manila to its home office, while steadfastly refusing to seek permission from the Philippine Central Bank to use those same assets to repay its creditors.

I. No Existing Federal Statute Or Regulation Establishes A Preemptive Rule Requiring Depositors In A Foreign Branch Of A United States Bank To Bear The Risk That The Foreign Government Will Freeze The Branch's Investments.

We begin with the simple proposition that deposit accounts are simply loans by depositors to banks, which are governed by traditional rules of local contract law. *See, e.g., Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944). As both lower courts held, where the foreign government has not frozen or seized *WFAL's deposit*, but rather adopted a rule affecting *Citibank's assets*, local law, as stated in *Sokoloff* and *Perez*, requires repayment by Citibank in New York. WFAL 2nd Cir. II, App. 8a-9a. Since this has been the law for decades, if Congress ever wanted to displace this law with a preemptive federal rule, it would have done so.

There is a strong "presumption against finding preemption of state law in areas traditionally regulated by the States." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). The contractual relationship between a bank and its depositor has long been governed by state law. Even national banks

> are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws.

First National Bank of Louisville v. Kentucky, 76 U.S. (9 Wall.) 353, 362 (1870).

Although Citibank repeatedly asserts there is an existing federal statute or regulation that limits its repayment obligation to its Philippine assets, *it fails to cite any authority in support of that claim.* Its failure to do so is not surprising. There is no existing federal statute or regulation that purports to govern this aspect of the contractual relationship between bank and depositor.

When asked by Justice White whether "the Federal Reserve Board would have the authority to put out a regulation to this effect," having "the force of law," Assistant Solicitor General Merrill replied:

> It's unclear, Justice White, and that proposition has never been tested. The Federal Reserve has broad authority over branch banks in foreign governments. . . . And it is conceivable that the statutory authority would be broad enough to justify the issuance of a preemptive rule. *But it is not the understanding of the Federal Reserve that it has at this point issued such a rule.*

March 19, 1989 Tr., 30-31 (emphasis supplied).

Notwithstanding the government's concession, Citibank continues to search for a preemptive law, and seizes upon portions of various federal statutes, regulations and rulings which deal with reserve requirements and deposit insurance. Citibank relies upon a portion of the Federal Reserve Act, 12 U.S.C. § 461(b)(6), and a portion of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(*l*)(5)(A), which exempt deposits "payable only outside . . . the United States" from reserve requirements and the deposit insurance program. These statutes do not purport to allocate risk. Similarly, none of the regulations, Board interpretations or staff opinions cited by Citibank establishes rules governing the allocation of risk in deposit contracts.

These regulations and interpretations were issued pursuant to authority granted under the Federal Reserve Act, and simply provide rules for determining whether deposit contracts trigger reserve requirements. As the Court of Appeals held, "Citibank's reliance on these provisions is misplaced." WFAL 2d Cir. II, App. 9a-10a. In each case, these rules specify that whether reserves are required is determined by looking at the terms of the deposit contract: they do not purport to dictate those terms. *See, e.g.*, 12 C.F.R. § 204.2(t) (one must look to the depositor's "agreement with the institution" to determine whether the deposit is payable outside the United States and thus exempt from reserves); 12 C.F.R. § 204.128(c) (even if a deposit purports to be payable outside the United States, reserves are required if under its agreement with the depositor the bank has "guaranteed" repayment at the home office); 35 Fed. Reg. 2,768 (1970) (same); 1 Fed. Res. Reg. Serv. at 2-330 (Staff Op., Feb. 23, 1982) (same); *id.* at 2-521.1 (erroneously cited by Citibank as 2-330.01) (Staff Op., March 21, 1983) (same); *id.* at 2-330.1 (Staff Op., July 29, 1983) (same).[8]

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[8] Citibank also relied heavily on a 1918 legal opinion issued by the then General Counsel of the Federal Reserve Board, 4 Fed. Res. Bull. 1123 (1918), claiming that it demonstrates an attempt by the Board to "insulate the domestic banking system and 'the interests of the parent bank' from sovereign risk." It does nothing of the kind. In that bulletin, the General Counsel opined that foreign branch deposits were exempt from reserves since, due to geographic constraints and differences in local currency, the Federal Reserve Banks could not provide offshore branches with emergency cash in the event of a run on the branch. But the General Counsel specifically noted that even though foreign branch deposits were

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Citibank's examples do not purport to govern the allocation of risk between a bank and its depositors. Rather, they simply provide a set of rules for determining whether or not a bank is required to maintain reserves or pay insurance assessments for any given deposit. Indeed, they expressly leave it to the parties to allocate sovereign risk between themselves. *E.g.*, 12 C.F.R. § 204.128(a), App. 88a:

> In accepting deposits at branches abroad, some depository institutions may enter into agreements from time to time with depositors that in effect guarantee payment of such deposits in the United States if the foreign branch is precluded from making payment.

The thrust of existing statutes, regulations and rulings is that, once the parties have contractually agreed on how to allocate risks, then certain reserve and deposit insurance consequences flow from the terms of their agreement.

Citibank turns this cause and effect relationship on its head. Citibank argues that its own unilateral treatment of WFAL's deposits for reserve and FDIC insurance purposes means that WFAL must have assumed sovereign

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exempt from reserve requirements, the bank's obligation under the deposit contract was *not* limited to the assets of the offshore branch. To the contrary, "there is no separate corporate entity as between the parent bank and its branch. A deposit liability of the branch is, therefore, a liability of the parent bank . . . . " *Id.*

risk. That is not the case. When Citibank's argument is unraveled, it is clear that Citibank urges the untenable conclusion that the depositor bears sovereign risk as a matter of federal law, even though the language upon which Citibank relies expressly leaves that allocation of risk to the parties.

In short, the statutes, regulations and rulings cited by Citibank do not even begin to provide the basis for federal preemption set forth in *Northwest Central Pipeline Corp. v. State Corporation Comm'n.*, 489 U.S. 493 (1989),[9] for they do not purport to govern any aspect of the contractual relationship between the bank and its depositor – much less "to occupy the entire field" heretofore left to the states.

Citibank argues that the reserve treatment and insurance status of foreign branch deposits are *"predicated"* on certain *"assumptions"* and *"understandings"* regarding how certain risks are allocated between the parties under

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[9] As this Court has stated, the test for preemption is:

> In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

Northwest Pipeline, supra, 489 U.S. at 509 (parallel and other citations omitted).

the deposit contracts. Although this may well be true, those "assumptions" and "understandings" are relevant, if at all, only to Citibank's claim that the federal government's interest in these matters is sufficiently strong to justify the creation of a federal common law. It is that issue to which we now turn.

II. There Is No Conflict Between Federal Law Or Policy And State Law That Would Support Application Of The Doctrine Of Preemption Or The Creation Of Federal Common Law.

What Citibank is really arguing is that this Court should create a new body of federal contract law limiting repayment to the assets of the branch. But, as the Court of Appeals held, and as we further demonstrate in Part A, there is no conflict between federal law or policy and state law that would justify the creation of a new body of federal common law. Similarly, even if the Court were to find that federal law existed in this area notwithstanding the discussion in Part I above, there is no conflict between federal law and state law which would warrant federal preemption. Moreover, as we demonstrate in Part B, this is not the appropriate forum for creating the law Citibank seeks.

A. This Court Should Not Reach Out To Create A New Body Of Federal Contract Law, Or Find Federal Preemption, That Would Limit A Bank's Repayment Obligation To The Assets Of The Deposit-Taking Branch.

Ever since the demise of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), federal courts create common law only in

"a few areas, involving 'uniquely federal interests.' " *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988), quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). When state law and federal law and policy are in harmony and the latter does not frustrate or conflict with the operation of the former, neither preemption nor the creation of federal common law is appropriate. In order to conclude that federal law has preempted state law or to establish a basis upon which to create federal common law, there must be a significant conflict between federal law or policy and state law. As Justice Harlan wrote for the Court in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966):

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions . . . among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, . . . it must be remembered that "Congress acts . . . against the background of the total *corpus juris* of the states . . . . " Hart & Wechsler, *The Federal Courts and the Federal System* 435 (1953).

Citibank acknowledges as much: it bases its plea for preemption on the argument that "local law . . . is preempted because it 'conflicts with federal law,' *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988), and

'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." Pet. 25.

Thus, the controlling question is, has Citibank shown a "significant conflict" between state law and federal law or policy. The Court of Appeals provided a complete answer. It held that Citibank has not shown any such conflict, much less a significant one, between federal law or policy and state law. *See* WFAL 2d Cir. II, App. 10a.

The Court of Appeals first noted that Citibank relies on 12 C.F.R. § 204.128 (1991), App. 88a-89a (the "1970 Board Interpretation"),[10] to argue that there is a clear federal policy placing the risk of foreign-law impediments to repayment on the depositor. The Court then pointed out, however, that under reserve regulations, the reserve status of a deposit, *i.e.*, whether it is to be exempt from reserves because it is "payable only at an office outside the United States," depends upon whether ". . . the depositor is entitled, *under the agreement with the institution*, to demand payment *only* outside the United States." (Emphasis the court's.) WFAL 2d Cir. II, App. 10a. From this the Court of Appeals concluded that as long as state law does not restrict the parties' ability to allocate risk by agreement, it does not conflict with federal law. *Id.*, citing *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31 (1977).

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[10] The 1970 Board Interpretation was removed from the Code of Federal Regulations in 1980 and was not restored until 1987, four years after the deposits in this case were placed. *See* 52 Fed. Reg. 47,693 (Dec. 16, 1987).

Citibank has attacked this conclusion primarily by arguing that the language in the regulation upon which the Court relied applies only to "sham" deposits and has no general application.[11] Pet. 14-18. Citibank's reading of the regulatory material is flawed. The regulation provides:

> "Any deposit that is payable only at an office located outside the United States" means (1) a deposit of a United States resident that is in a denomination of $100,000 or more, and as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States or (2) a deposit of a person who is not a United States resident as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States.

12 C.F.R. § 204.2(t), App. 87a.

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[11] Citibank's obvious concern that the Court's analysis of 12 C.F.R. § 204.2(t) is both correct and fatal to its defense is reflected in its mischaracterization of the Court's reading of the regulation. For example, Citibank states that the Court "read [the quoted] clause of 204.2(t) to mean that a deposit meets the requirement that it be payable 'outside the United States' only if the depositor's agreement with the bank contains a *specific written* provision" to this effect. (Emphasis added.) Pet. 15-16. Nothing in the Court of Appeals' decision supports this assertion. Compare WFAL 2d Cir. II, App. 10a. In addition, the trial court obviously recognized that understandings are incorporated into deposit agreements other than by "specific written provisions." See n. 12 below. Similarly, in its amicus brief to the trial court, the Federal Reserve Bank of New York explained that "the agreement between the parties need not be in writing." Memorandum of Law of Federal Reserve Bank of New York As *Amicus Curiae*, WFAL I, n. 18 and accompanying text.

As is evident, the regulation excludes deposits by U.S. residents under $100,000 from reserve-free status without regard to the terms of the agreement between the depositor and bank. The state-law restriction test relied upon by the Court of Appeals has no application to these small deposits by U.S. residents. However, the regulation goes on to grant reserve-free status to other deposits, *i.e.*, large deposits by U.S. residents and deposits of all sizes by nonresidents if, and only if, they satisfy the state-law restriction test. 12 C.F.R. § 204.2(t). Further, Citibank's attack on that language ignores the fact that it was taken virtually verbatim from, and is said to constitute a "codification" of, paragraph (c) of the 1970 Board Interpretation that constitutes the foundation upon which Citibank's entire federal policy argument is built.[12] *See* the amicus brief of the Federal Reserve Bank of New York, *supra* n. 9, text before n. 17, at 10.

Thus, Citibank has it backwards. While the language Citibank finds so objectionable does not apply to small deposits by United States residents, it does apply to all other deposits by residents and nonresidents alike, and was copied from and continues to appear in the present version of the 1970 Board Interpretation.

Given the harmony between state law and the reserve regulations, both of which look to the agreement of the parties to determine their respective rights and liabilities, there is no conflict, much less a "significant" one, between federal law or policy and state law. Citibank

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[12] "His agreement" was changed to "the agreement" and the words "the bank" were changed to "the institution." *Compare* 56 Fed. Res. Bull. 140 (1970) *with* 12 C.F.R. § 204.2(t).

does not challenge the Court of Appeals' holding that New York law "does not restrict a bank's freedom to enter into an agreement that allocates the risk of foreign sovereign restrictions." WFAL 2d Cir. II, App. 10a. Citibank has never demonstrated that reserve regulations operate to allocate sovereign risk. Indeed, *all* of the interpretations cited by Citibank expressly contemplate that the parties are free to allocate risk.[13] In the absence of a contrary agreement, New York law places the risk of foreign-law impediments on Citibank, not the depositor.

In sum, all of the applicable authority supports the Court of Appeals' holding that federal policy does not allocate sovereign risk to depositors as a matter of law, but instead contemplates that one must look to the agreement of the parties to determine who bears that risk.

Still searching for a conflict between federal law and state policy, Citibank contends that when the Federal Reserve exempted foreign branch deposits from reserve requirements and insurance assessments, it made certain "assumptions." Pet. 15-19. One of these assumptions was that, if the deposit contract did not provide otherwise, principles of state contract law would provide that "[a] customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes

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[13] *See, e.g.*, 12 C.F.R. § 204.128(c) (reserves are required if under its agreement with the depositor the bank has "guaranteed" repayment at the home office); 35 Fed. Reg. 2,768 (1970) (same); 1 Fed. Res. Reg. Serv. at 2-330 (Staff Op., Feb. 23, 1982) (same); *id.* at 2-521.1 (Staff Op., March 21, 1983) (same); *id.* at 2-330.1 (Staff Op., July 29, 1983) (same). Each of the three staff opinions in turn cite and rely upon 12 C.F.R. § 204.2(t), which is the regulation Citibank attacks.

whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." 12 C.F.R. § 204.128(c). Citibank argues that this assumption was incorrect: under state contract law, if the parties fail to specify otherwise, the deposit-taking bank must bear that risk. Accordingly, Citibank concludes there is a conflict between state law and federal "policy" which this Court should resolve by creating a new federal law. Pet. 23-25. Citibank's conclusion is wrong. Federal law is consistent with state law: both the Court of Appeals and the trial court found that under state law, the result would have been different if the Philippine government had "imposed restrictions on withdrawal" – for example, by actually expropriating the deposits. WFAL 2d Cir. II, App. 8a-9a; WFAL II, App. 45a; *see, e.g., Perez v. Chase Manhattan Bank, N.A.*, 61 N.Y.2d 460, 463 N.E.2d 5, *cert. denied*, 469 U.S. 966 (1984). Since both lower courts also held that the Philippine government had not imposed any such "restrictions on withdrawal" here, and Citibank does not challenge this finding, there is no occasion for the creation of federal law.

In any event, there is no need to replace or supplement state law in order to enable the Board to implement its reserve regulations. The Board may condition reserve-free status in any manner it sees fit. Thus, if the Board actually believed that a deposit should be reserve-free only if the depositor bears risk associated with a bank asset portfolio, it could require the parties to include such a provision in the deposit agreement.[14] It has been more

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[14] Citibank has previously contended that it might not be possible to include a provision to this effect in its deposit

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than two years since Assistant Solicitor General Merrill acknowledged to this Court that no statute or regulation contains such a requirement. In the interim, neither Congress nor the Board has changed that state of affairs. These are certainly not the circumstances where this Court should grant the extraordinary relief of creating federal common law. As shown in Part B, for reasons of institutional competence, any change in the law in this area should be left to Congress or the Board.

B. Reasons of Institutional Competence Counsel Judicial Restraint: Any Needed Reform Should Be Accomplished by Direct Regulation or New Legislation.

Citibank seeks federal common law that will require sovereign risk to be allocated to foreign-branch depositors *in all deposit contracts under all circumstances*. If there

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agreements. This is a factual question the trial court resolved against Citibank:

> Although it is not for me to tell you how to practice law and do things, it seems to me that it would be a dead cinch, you are dealing with a very small number of people, small number of banks, small number of brokers, and it seems to me that it would be a dead cinch for Citibank to publish their views in such a way that no one in that small community could realistically say he wasn't aware of it when making a deposit.

J.A 38. For example, potential depositors could be required to acknowledge a memorandum of terms before Citibank's funding computer would authorize its money traders to accept deposits from them, just as these traders must confirm banks' creditworthiness before they place funds with them.

is to be federal law in this area, it should be established by Congress or the Federal Reserve Board. This case is far afield from the traditional circumstances in which courts have created federal common law. Usually, existing federal law powerfully informs the need for and content of the proposed federal common law. Here, the claimed federal interest and policies remain at a high level of abstraction.

Congress is far better equipped to debate the relative merits of the policy considerations that Citibank raises. These policy debates must also account for countervailing considerations, for example the consequences of upsetting existing contracts and departing from existing market practices; the utility of imposing Citibank's proposed rule onto an international market; and the belief by many bankers that the rule Citibank proposes would actually place United States banks at a competitive disadvantage.

This Court is ill-equipped to balance these policy considerations. The international implications should be settled by the Executive Branch. *See Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The weighing of domestic and regulatory considerations falls within Congress' special province. As explained in *United States v. Gilman*, 347 U.S. 507, 511-13 (1954):

> The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

In matters such as this, courts properly defer to the superior lawmaking abilities of other branches. *Bush v.*

Lucas, 462 U.S. 367, 390 (1983). So should this Court, for reasons of institutional competence. If rules regarding the allocation of sovereign risk are to be adopted, it should be done prospectively, and only by Congress or the Federal Reserve Board. This Court should deny review since the narrow decision of the Court of Appeals involves only a simple contract dispute under state law.

Indeed, recent actions by the Federal Reserve Board suggest that even the United States acknowledges that if changes in existing law are necessary and appropriate, they can best be achieved by the combined action of Congress and the Federal Reserve Board. As part of the recent legislation dealing with the savings and loan crisis, ultimately enacted on November 26, 1991 as the Federal Deposit Insurance Corporation Improvement Act of 1991, the Board proposed a provision which would have authorized the Board to do what Citibank asks this Court to do, i.e., allocate sovereign risk between banks and their depositors. Senate bill S.543 § 1131. It is telling that Congress omitted that provision from the legislation it actually adopted just weeks ago.

While the Board may choose to resubmit its proposal when Congress reconvenes, the fact that Congress has recently considered such legislation, and may do so again in the near future, robs this case of any significance. There is simply no reason for this Court to jump into the fray. Legislation either will or will not pass. If it passes, the legal conclusions this Court may reach here will obviously be of little significance, for in Citibank's words, "the legislation w[ill] resolve the issue of liability arising out of *future* action of foreign governments." Citibank Application For Extension Of Time, September 5, 1991, at

4. If it fails to pass, this will suggest, if anything, that Congress does not share Citibank's concerns and is content with the conclusions reached by the long line of cases of which the instant case is the most recent. Either way, there is nothing here which makes this fact-bound contract case certworthy.

III. Citibank's Failure To Seek Permission To Repay With Philippine Assets Is Fatal To Its "Impossibility" Defense.

In addition to rejecting Citibank's "federal law" arguments, the Court of Appeals found an independent state ground for affirming the judgment in WFAL's favor: Citibank failed to satisfy its good faith obligation to seek permission from the Philippine Central Bank to repay WFAL's deposits. WFAL 2d Cir. II, App. 10a-11a. That failure completely invalidates Citibank's "impossibility" defense – even if this Court were to create a new federal law limiting Citibank's repayment obligation to its Philippine assets. Neither Congress nor the Board, the bodies properly charged with considering the new rule of law Citibank proposes, could save Citibank from its predicament in this case. If a new rule of law or regulation allocated sovereign risk to the depositor in these circumstances, Citibank would still remain liable here because it never even sought permission to repay. Thus, Citibank's plea for federal common law is moot, for it would not alter the outcome of this case. This Court does not sit to render advisory opinions. As the trial court held,

> When the "government or other restraint does not render performance absolutely impossible, it is the duty of the promisor to make a bona fide

> effort to dissolve and be relieved of the restraint which operates to prevent his performance." *Brown v. J.P. Morgan* . . . .

WFAL II, App. 47a. *See also* WFAL I, App. 61a.

Citibank does not claim that it sought permission to repay its deposits with Philippine assets. Instead, it makes the speculative claim that approval to pay with branch assets would have been denied if sought. The Court of Appeals was not persuaded by this argument. As demonstrated above, new evidence reveals that Citibank has remitted over $160 million in Philippine branch assets to its home office as "profits" during the period in which those assets were allegedly "frozen" by the Philippine government. The Court of Appeals noted, "Citibank does not dispute that it received these profits. . . ." WFAL 2d Cir. II, App. 11a. This strongly suggests that if Citibank had made a good faith effort to obtain Central Bank approval to use Philippine assets to repay the deposits, such approval would have been forthcoming. *See also* J.A. 91-92, 95-96.

As the Court of Appeals held, it is unnecessary to resolve the question of whether Central Bank approval would have been granted. Under controlling legal principles, courts will not speculate as to the likely outcome of such a request.[15] Rather, "the burden of establishing the

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[15] This is true even if the party asserting the defense can show that permission would almost certainly have been denied if sought. *See, e.g., Paramount Pictures, Inc. v. Sparling*, 93 Cal. App. 2d 768, 774-776, 209 P.2d 968, 972, 973, *cert. denied*, 339 U.S. 953 (1950). In that case the court, applying New York law,

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nature, extent and causative effect of [an] alleged impossibility is invariably held to be upon the party asserting it." S. Williston, *Contracts* (3d ed. 1978) at 272. Accordingly, Citibank's failure to seek Central Bank approval to repay WFAL's deposits is fatal to its "impossibility" defense. As the Court of Appeals concluded:

> [W]e note that . . . Citibank . . . has received profits of at least $25 million from Citibank/Manila during the period 1984-1989 . . . . Citibank does not dispute that it received these profits . . . . Suffice it to say that Citibank's acknowledged ability to obtain Philippine Central Bank approval of transfers to it of moneys as profits appears to support the district court's finding, if further support were needed, that Citibank . . . did not satisfy its good faith obligation to seek that government's approval of repayment of WFAL's deposits . . . .

WFAL 2d Cir. II, App. 10a-11a.

In its Petition, Citibank fails to mention these embarrassing facts, much less explain them. Citibank does not

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held that a bank's failure to repay a deposit was not excused when it failed to take an appeal from a freeze order even though it showed that such appeals were routinely rejected. *Accord, Fujikawa v. Sunrise Soda Works, Co.*, 158 F.2d 490, 493-4 (9th Cir. 1946), *cert. denied*, 331 U.S. 832 (1947) (relying on New York law); *Baer American Banking Corp. v. Kattan*, 82 Civ. 5834, slip op. (S.D.N.Y. 1984); *Saul v. DeKoenigsberg*, 147 N.Y.S.2d 396, 399 (Sup. Ct. N.Y. 1955); *Brown v. J.P. Morgan*, 177 Misc. 626, 31 N.Y.S.2d 323, 334 (Sup. Ct. N.Y. Cty. 1941), *rev'd on other grounds*, 265 App. Div. 631, 40 N.Y.S.2d 229 (1st Dep't 1943), *aff'd*, 295 N.Y. 867, 67 N.E.2d 263 (1946).

challenge this part of the Court of Appeals' holding, which is independently dispositive. Citibank's concession that it failed to seek Philippine Central Bank approval to repay WFAL's deposits, especially in light of the $160 million in repatriated "profits," eviscerates any "impossibility" defense. For this reason alone, the Court should deny *certiorari* because "plenary review" in this type of case is not a "wise use of [this Court's] limited judicial resources." WFAL S. Ct., App. 25a.

CONCLUSION

Citibank's petition should be denied.

Respectfully submitted,

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December 13, 1991

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APPENDIX A

EXHIBIT A

PROFITS OF CITIBANK'S PHILIPPINE BRANCH OPERATIONS TRANSFERRED TO CITIBANK'S HEAD OFFICE 1985-1989

		Amounts Transferred	
Philippine Branch Unit	*Year*	*Pesos*	*US Dollars*
Foreign Currency Deposit Unit (FCDU)	1989	158,690,000	7,289,389
FCDU	1988	369,038,000	17,827,922
Regular Banking Unit (RBU)	1989	499,452,000	22,942,214
RBU	1988	105,953,000	5,118,502
RBU	1987	473,821,000	22,856,777
RBU	1986	645,631,000	31,387,019
Combined RBU and FCDU	1985	1,044,788,000	55,235,950
TOTAL PROFITS TRANSFERRED		P 3,397,373,000	US $162,657,773

Sources of Data: Citibank NA-Philippine Branches, audited financial statements, years 1985 through 1989. Exchange rates used to calculate equivalent U.S. dollar amounts are year end rates from quotations published in the Wall Street Journal

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IN THE

Supreme Court of the United States

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Petitioner,

v.

WELLS FARGO ASIA LIMITED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONER

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1 Fed. Res. Reg. Serv. ¶ 2-330 (Staff Op., Feb. 23, 1982) 6

1 Fed. Res. Reg. Serv. ¶ 2-330.1 (Staff Op., July 29, 1983) 6

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REPLY BRIEF OF PETITIONER

This is not a "simple contract dispute" between private parties. Brief for Respondent in Opposition at 2, 24 ("Br. in Opp'n"). To begin with, this Court granted certiorari once before because of the severe practical implications of the court of appeals' decision. *See Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660 (1990). Now, as then, this case presents issues of profound importance to the bank regulatory system and to the foreign commerce and foreign relations of the United States.

On remand, the Solicitor General advised the court of appeals of the significance of the issues and stated that the United States had reached a concluded position in this case that *"a uniform federal rule is essential to protect federal interests and achieve congressional objectives."* Brief for the United States as *Amicus Curiae* at 22, *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 936 F.2d 723 (2d Cir. 1991) (No. 87-7685) ("U.S. 2d Cir. Am. Br.

II") (emphasis supplied).[1] In the Solicitor General's view, federal law "establishes a federal rule of decision in this case" that places sovereign risk with the depositor. U.S. 2d Cir. Am. Br. II, at 13. Nonetheless, the court of appeals rendered a decision in direct conflict with the views of the United States.

The New York Clearing House Association and the Institute of International Bankers have filed a brief in support of a grant of certiorari. These *amici*, who represent "divergent economic interests" within the international banking community and most of the principal participants in the international interbank placement market (including depositors with "substantial sums of blocked funds on deposit at Citibank/Manila"), also express grave concern over the decision below.[2] As *amici* explain, the court of appeals' ruling "represents a radical departure from settled law that could cause considerable turmoil in the practice of international banking." (Am. Br. at 3.)[3]

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[1] In his brief on remand, the Solicitor General stated:

> The United States observed in its previous brief to this Court that the federal government's unique interests in regulating the international operations of United States banks may require application of a federal rule of decision in this area. *We found it unnecessary in that brief or in the Supreme Court proceedings to take a concluded position on that issue.* The Supreme Court instructed this Court, however, to consider on remand whether a "federal common law rule" should be applied in this instance. *Our further consideration of the question has convinced us that a uniform federal rule is essential to protect federal interests and achieve congressional objectives.*

U.S. 2d Cir. Am. Br. II, at 22 (emphasis supplied) (citations omitted).

[2] Brief of the New York Clearing House Association and the Institute of International Bankers as *Amici Curiae* in Support of Petitioner at 2-3 ("Am. Br.").

[3] The position of *amici* belies the snippets from the trial record cited by respondent to the effect that Citibank was somehow alone among market participants in its view on allocation of sovereign risk. (Br. in Opp'n at 5.)

Respondent says nothing about the practical consequences of this case. Remarkably, it does not even allude to the federal government's position, much less address the concerns expressed by the Solicitor General.[4] Nor, as we now explain, does it rebut the showing that the decision of the court of appeals misconstrues federal law.

I. THERE IS A CONFLICT BETWEEN STATE AND FEDERAL LAW

Respondent first argues that there is no conflict between New York law and federal law because both permit the parties to agree to allocate sovereign risk. (Br. in Opp'n at 13-14, 20.) Of course, the parties themselves may allocate sovereign risk,[5] but that is not what this case is about. This Court, reversing the court of appeals, has specifically held that there was *no agreement* between the parties on the allocation of sovereign risk. Petition for a Writ of Certiorari App. B at 19a-23a ("Pet."). Having done so, the Court then stated the issue on remand to be whether, *in the absence of such an agreement*, sovereign risk, as a matter of law, is placed on the depositor or on the U.S. bank. (Pet. App. B at 19a, 23a.)

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[4] Respondent's only reference to the government's submission is an extemporaneous statement made at a previous oral argument before this Court (Br. in Opp'n at 11) that respondent later distorts (Br. in Opp'n at 22). As already noted, at the time this case was argued, the government had not yet concluded its position on this issue. U.S. 2d Cir. Am. Br. II, at 22. It now has. Respondent's principal effort to denigrate the federal interests at stake here is based on a single nineteenth century case that involved neither foreign relations nor foreign commerce concerns and predated the Federal Reserve and Federal Deposit Insurance Acts. (Br. in Opp'n at 10 (citing *First Nat'l Bank v Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870)).)

[5] Respondent does not dispute that the parties operated in a vast international nondocumentary market. It does, however, misstate Citibank's position when it claims that Citibank advocates that "sovereign risk . . . be allocated to foreign-branch depositors *in all deposit contracts under all circumstances*." (Br. in Opp'n at 22.)

Respondent next argues that there can be no federal rule to create a conflict because no statute or regulation "purport[s] to govern the allocation of risk between a bank and its depositors." (Br. in Opp'n at 13.) But as we explained in the petition, and as the Solicitor General and all of the federal agencies agree, federal statutes and regulations distinguishing foreign branch and domestic deposits long have embodied a baseline rule that the foreign branch depositor bears the sovereign risk. For decades, the federal bank regulators have acted in accordance with this rule, and federal statute has specifically preserved the distinctions between foreign and domestic deposits. (Pet. at 11-14.) Even the court of appeals recognized the existence of a federal standard (Pet. App. A at 9a-10a), but gave it the wrong content by wholly misreading 12 C.F.R. § 204.2(t) (1991). (Pet. at 13-19.)

Nothing in respondent's analysis of Section 204.2(t) (Br. in Opp'n at 18-19) salvages the court of appeals' strange reading of this regulation. Respondent concedes that Section 204.2(t) preempts state law for deposits of U.S. residents under $100,000 because, no matter what the deposit agreements state with respect to allocation of sovereign risk, the deposits will not be considered foreign deposits. Respondent then argues that, for all other deposits, Section 204.2(t) provides that the parties are free to agree to allocate sovereign risk. But all this means is that Section 204.2(t) tells us nothing about the applicable federal law where—as here, and in virtually all interbank Eurodollar placements—there is no such agreement. It is a different Federal Reserve Board regulation—12 C.F.R. § 204.128(c) (1991)—that deals with this circumstance.[6]

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[6] Respondent's arguments (Br. in Opp'n at 19) that the language of Section 204.2(t) was taken in part from the predecessor of Section 204.128(c), and that Federal Reserve Board interpretations of Section 204.128(c) refer to Section 204.2(t), do not address the meaning of this language; they merely restate the position previously taken by respondent that Section 204.2(t) "simply para-

Therefore, respondent must ultimately confront Section 204.128(c) which states that a foreign branch depositor "assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals." Respondent (Br. in Opp'n at 20-21) dismisses this provision by arguing that: (1) it expresses "principles of state contract law;" (2) it applies only to restrictions that are tantamount to expropriation because analogous state law purportedly does so; and (3) both lower courts held that the Philippine government did not, in effect, expropriate respondent's deposits. For these reasons, according to respondent, there is no conflict between New York law and Section 204.128(c).

The argument that Section 204.128(c) is grounded in state law is nonsense. The regulation itself neither says nor implies that the term "restrictions on withdrawals" be interpreted by reference to state law, and the Federal Reserve Board, the federal agency that promulgated Section 204.128(c), believes that it establishes a set of federal standards. U.S. 2d Cir. Am. Br. II, at 18-21. Certainly, the Philippine law created "restrictions on withdrawals" within the plain meaning of these words.[7] Section 204.128(c) nowhere suggests that "restrictions on

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phrases" the Federal Reserve Act. Brief for Respondent at 37, *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660 (1990) (No. 88-1260).

[7] To claim, as respondent does (Br. in Opp'n at 10, 21) that the lower courts "held that the Philippine government had not imposed any . . . 'restrictions on withdrawal' " contradicts the actual holdings. In fact, the district court's opinion explicitly declined to reach the issue whether, under New York law, the Philippine government's actions were tantamount to expropriation—much less construe the term "restrictions on withdrawals" in Section 204.128(c) —and decided the case solely on another ground. (Pet. App. E at 45a-46a.) The court of appeals merely quoted the district court decision on this point, without providing any elaboration. (Pet. App. A at 8a-9a.) Whether or not New York law would view the Philippine government's actions as the equivalent of expropriation has no relevance to the meaning of Section 204.128(c).

withdrawals" is limited to expropriations, nor has it ever been so construed.[8]

Respondent's own reading of the federal statutes, regulations and policies demonstrates precisely why this case presents a significant question of federal banking law. Throughout its brief, respondent argues that 12 C.F.R. § 204.2(t), 12 C.F.R. § 204.128(c), and other provisions of federal law do not have the meaning ascribed to them by Citibank, the Solicitor General, the responsible federal agencies, and the international banking community. There is an urgent need for an answer to the federal law question presented here. It is time for the matter to be settled conclusively.

II. RESPONDENT'S ARGUMENTS CANNOT HIDE THE IMPORTANT ISSUE OF FEDERAL LAW

Respondent argues that certain state law issues are "independently dispositive" of this case. (Br. in Opp'n at 28.) It claims that "Citibank would still remain liable here because it never even sought permission to repay [respondent]," and that "Citibank does not claim . . . it sought permission to repay its deposits with Philippine assets." (Br. in Opp'n at 25-26.) But this is just the opposite of what the district court found; the district court squarely held that Citibank did all that was required of it with respect to Citibank/Manila's Philippine *and* non-Philippine assets. (Pet. App. E at 46a-47a.) That finding has not been disturbed.

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[8] Respondent's suggestion (Br. in Opp'n at 17 n.10) that this provision was not continuously part of the Code of Federal Regulations is nonsense as well. Section 204.128(c) was never repealed by the Federal Reserve Board, as its subsequent republication in the Code makes clear, and it was continuously published in the Federal Reserve Regulatory Service (a Federal Reserve Board publication of applicable regulations and opinions). Its principle was also reiterated in Staff Opinions of the Federal Reserve Board in 1982 and 1983. 1 Fed. Res. Reg. Serv. at ¶ 2-330 (Staff Op., Feb. 23, 1982); *id.* at ¶ 2-330.1 (Staff Op., July 29, 1983).

The district court did say that Citibank had not sought the Philippine government's permission to repay respondent out of its *U.S. assets*. But, as this Court made clear in its reversal of the court of appeals, the issue here is not whether Philippine laws "bar the collection of [respondent's] deposits from the general assets of the Citibank in the State of New York" but "rather, is whether Citibank is obligated to allow collection in New York." (Pet. App. B at 19a.) Whether Citibank could repay respondent's deposits with its U.S. assets (with or without Philippine government approval) has no bearing on whether Citibank is *obligated* to do so under applicable law.

Respondent tries to raise the same issue in another context by what it calls the "embarrassing" fact that Citibank engaged in a "secret scheme of profit repatriation" instead of repaying respondent. (Br. in Opp'n at 6, 9, 27.) Respondent's charges are intemperate and irresponsible and have no place here.[9] There was nothing secret about Citibank/Manila's repatriation of profits; it occurred in accordance with published decrees that clearly articulated Philippine law, and respondent concedes that information disclosing the repatriation was always contained in Citibank/Manila's public filings with the Philippine Securities and Exchange Commission. (Br. in Opp'n at 6 n.6.)

The Philippine law that forbids Citibank/Manila from repaying the principal of respondent's deposits expressly authorizes it to pay respondent (and similarly situated depositors) interest on these deposits. Analogously, Philippine law prohibits businesses like Citibank/Manila from

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[9] It is difficult to understand why respondent waited more than six years after it filed this case and until after full briefing on remand to raise this issue. Contrary to respondent's charge (Br. in Opp'n at 5-6) nothing in the statements cited by respondent suggests that Citibank made any misrepresentation concerning the effect of Philippine law.

repatriating their capital but permits remittance of some profits. The Philippine law reflects the Philippines' national policies relating to the use of scarce foreign exchange. Even if Citibank/Manila had remitted no profits during the relevant period, it still would not have been permitted by the applicable Philippine decrees to repay the principal of respondent's deposits.[10]

Neither these arguments nor others raised by respondent deal with the central issue in this case. That issue—defined by this Court for the court of appeals—is: in the absence of an agreement on who should bear sovereign risk, what law should govern and what is the content of that law? (Pet. App. B at 24a.) Respondent repeatedly skirts this issue by saying that the parties are free to contract as they wish and by referring to so-called independent grounds for decision. Respondent also says that the case should be settled by Congress because recent legislation, whose principal purpose and effect was to recapitalize the bank insurance fund, might have included a provision (one of hundreds that never found its way into this year's banking legislation) that would have allocated sovereign risk to the depositor.[11] Or, respondent contends that the case should be left to the Executive Branch because this Court is ill-equipped to balance the policy considerations and international implications inherent in allocating sovereign risk. (Br. in Opp'n at 23.) Of course, the position of the executive departments was

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[10] In any event, contrary to respondent's assertions that the court of appeals' paragraph of *dicta* on remittances was "independently dispositive," the court specifically declined to reach the issue raised by respondent. (Br. in Opp'n at 27-28.) In fact, in a sentence carefully cropped by respondent from its quotation of the paragraph, the court of appeals expressly stated, "[w]e need not resolve this question." (Pet. App. A at 11a.)

[11] This Court has declared its reluctance "to draw inferences from Congress' failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988).

rejected—indeed, was totally ignored—by the court of appeals.

This type of argument neither props up the court of appeals' erroneous decision nor dispels the importance of this case. The court of appeals adopted a rule of decision in direct conflict with the rule of federal law presented to it by the Solicitor General. Its decision is highly damaging and wrong. The reasons for granting certiorari at this juncture are even more compelling than those that previously persuaded the Court to hear this case. Accordingly, Citibank's petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

CITIBANK, N.A., PETITIONER

v.

WELLS FARGO ASIA LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in the absence of an agreement to the contrary, a federally chartered and insured bank may be held liable for deposits placed with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner Citibank, N.A. (Citibank) seeks review of a decision, issued on remand from this Court, affirming a district court's judgment that Citibank's New York office is obligated to repay two dollar-denominated deposits that respondent Wells Fargo Asia Ltd. (WFAL) placed with a Citibank branch located in Manila, Republic of the Philippines. Citibank contends, as did the United States as amicus curiae below, that in the absence of an agreement to the contrary, Citibank's home office is not obligated to repay deposits placed with its branch in a foreign country when the foreign government prevents the branch from repaying them.

1. Congress has authorized federally chartered national banks (U.S. banks) to establish foreign branches "for the furtherance of the foreign commerce of the United States, and to act if required to do so as the fiscal agents of the United States." See Federal Reserve Act, 12 U.S.C. 601 *et seq.*; 12 C.F.R. Pt. 211. A U.S. bank wishing to establish a foreign branch must seek permission from the Board of Governors of the Federal Reserve System (Federal Reserve Board) to operate the branch "upon such conditions and under such regulations as may be prescribed by the said board." 12 U.S.C. 601. See 12 C.F.R. 211.3(a).[1] A foreign branch of a U.S. bank is subject, of course, to local laws and regulations that may impose additional restrictions on its operations.[2]

A U.S. bank normally is responsible for the ultimate solvency of its foreign branches, which are "office[s]" of the bank. 12 C.F.R. 211.2(k). See 3 Fed. Res. Bull. 198 (1917); see also Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983). Nevertheless, the United States requires that a U.S. bank "shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office." 12 U.S.C. 604. See also H.R. Rep. No. 69, 63d Cong., 1st Sess. 30, 74 (1913).

In addition, the United States has drawn distinctions between a U.S. bank's foreign and domestic deposits that are critical to the federal regulatory scheme. For ex-

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[1] The Federal Reserve Board also approves the establishment of foreign branches of state-chartered banks that are members of the Federal Reserve System. See 12 U.S.C. 321. In addition, the Federal Deposit Insurance Act requires state-chartered banks that are not members of the Federal Reserve System to seek approval from the Federal Deposit Insurance Corporation (FDIC) before establishing foreign branches. See 12 U.S.C. 1828(d)(2).

[2] The major industrial nations have formulated general guidelines describing the regulatory responsibilities of the home country and the host country. See Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983).

ample, Congress has dictated that federally imposed reserve requirements on deposits "shall not apply to deposits payable only outside the States of the United States and the District of Columbia." 12 U.S.C. 461(b)(6). This exemption, which was codified in 1980, reflects a Federal Reserve Board practice dating back to 1918. See H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979); 125 Cong. Rec. 19,671 (1979); 12 C.F.R. 204.1(c)(5), 204.128; 35 Fed. Reg. 2768 (1970); 4 Fed. Res. Bull. 1123 (1918). "The exemption is intended principally to enable foreign branches of U.S. depository institutions to compete on a more nearly equal basis with banks in foreign countries in accordance with the laws and regulations of those countries." 12 C.F.R. 204.128(c).[3]

The statutory distinction between deposits "payable only outside the United States" and deposits that are payable (and hence "collectible") here has led to the development of the "Eurodollar" market. Federal reserve requirements and deposit insurance assessments increase the costs to banks of acquiring deposits. Financial institutions that accept deposits free from reserve requirements and insurance assessments can achieve savings in obtaining funds. See R. Dale, *The Regulation of International Banking* 12-13 (1984). U.S. banks are able to obtain dollar-denominated deposits abroad on an equal par with foreign banks, free from United States reserve requirements and insurance assessments (and are able to compete with foreign financial institutions in the international money markets) because they accept dollar-denominated funds at their foreign branches that are

[3] Similarly, for more than 50 years, Congress has exempted from FDIC insurance assessments and coverage those deposits "payable only at an office * * * located outside of the States of the United States." 12 U.S.C. 1813(*l*)(5)(A). Furthermore, when Congress or the Federal Reserve Board has imposed interest rate, payment, and advertising limitations on deposits, it generally has provided that such limitations shall not apply to deposits payable only abroad. See 12 U.S.C. 371a, 371b; 12 C.F.R. 217.1(c)(2); 21 Fed. Res. Bull. 862, 863 (1935).

legally "payable only" at the foreign branch. See 12 C.F.R. 204.128(c). Thus, the regulatory exemptions provide a forceful "stimulus" and "the basic inducement" for U.S. banks to participate in the Eurodollar market. See R. Dale, *supra*, at 12, 14, 23.

The United States' regulatory exemptions impose an essential condition on Eurodollar participation: the foreign branch deposit *must* be "payable only" abroad. A foreign branch deposit that lacks that essential feature receives the same regulatory treatment (and incurs the same associated costs) as a domestic dollar deposit. See 12 C.F.R. 204.128(c). Thus, the distinctive characteristic of a Eurodollar deposit is its place of payment—and its consequent freedom from reserve requirements and insurance assessments. Indeed, international bankers and commentators generally *define* Eurodollars as dollar-denominated deposits that have their situs outside the United States.[4]

2. Citibank currently operates a foreign branch office in Manila, the Republic of the Philippines (Citibank/Manila). Although Citibank/Manila obtains funding from Philippine depositors, it also obtains a portion of the funds needed for lending through Eurodollar deposits. Thus, in June 1983, a Singapore money broker acting on behalf of WFAL, a Singapore bank owned by Wells Fargo Bank, N.A., placed two Eurodollar deposits with Citibank/Manila. The broker telephoned Citibank/Manila and reached an oral agreement as to the amount of the deposits ($1 million each), the interest rate (10%), and

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[4] See, *e.g.*, E. Roussakis, *Commercial Banking in an Era of Deregulation* 188 (1984); P. Oppenheim, *International Banking* 146 (3d ed. 1978); S. Robinson, *Multinational Banking* 162 (1972); M. Friedman, *The Euro-Dollar Market: Some First Principles*, in *The Eurodollar* 273, 275 (H. Prochnow ed. 1970); Harfield, *International Money Management: The Eurodollar*, 89 Banking L.J. 579, 585 (1972). WFAL's expert witness, Professor Gunter Dufey, agreed that "[a] Eurodollar deposit is a time deposit denominated in U.S. dollars in a bank or bank branch located outside the United States." Tr. 632.

the maturity date (December 1983). In accordance with the customs of the Eurodollar market, the parties exchanged brief computer-generated telex messages confirming those terms. The telexes also provided remittance instructions for accomplishing transfer of the funds. As in the case of most Eurodollar transactions, the transfer was to be cleared through the parties' correspondent New York City banks. Pet. App. 13a-15a, 29a-30a, 38a-40a.

The transfer of funds from WFAL to Citibank/Manila proceeded routinely.[5] Prior to maturity, however, the Philippine government imposed emergency economic regulations that prevented Citibank/Manila from repaying the deposits. Specifically, the Philippine Board issued a Memorandum to Authorized Agent Banks (MAAB 47) requiring that "remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank * * * for prior approval." Pet. App. 15a. The Philippine Central Bank interpreted that decree to prohibit Citibank/Manila from repaying WFAL using its Philippine assets, and Citibank/Manila thereafter failed to repay WFAL's deposits at their stated maturity. *Id.* at 15a, 30a.

3. WFAL commenced this action against Citibank on February 10, 1984, in the United States District Court for the Southern District of New York, to obtain repayment of its Citibank/Manila deposits. Citibank/Manila obtained permission from the Philippine Central Bank

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[5] WFAL, which maintained a correspondent account at the New York City office of Wells Fargo Bank, N.A., instructed that office to transfer $2 million from the WFAL account to Citibank/Manila's correspondent account at the New York City office of Citibank. The correspondent banks then effected the transfer through the New York Clearing House Association's Interbank Payments System (CHIPS), a clearing mechanism that, among other things, permits member banks and other participants to credit and debit interbank dollar payments electronically and provides virtually instantaneous transfers of funds. See Pet. App. 13a-15a, 29a-30a, 39a-40a.

to repay the deposits—to the extent Citibank/Manila could—through use of Citibank/Manila's non-Philippine dollar-denominated accounts. As a result, Citibank/Manila was able to repay $934,000 of the $2 million owed. In addition, the Philippine Central Bank has permitted Citibank/Manila to reconvert sufficient pesos into dollars to make interest payments on the remaining principal. WFAL seeks return of the unpaid portion of the principal. Pet. App. 15a-16a, 30a.

WFAL moved for summary judgment, but the district court denied WFAL's motion (Pet. App. 64a-77a), conducted a bench trial (*id.* at 52a-62a), and entered judgment requiring Citibank's home office to repay the remaining balance of the deposits (*id.* at 63a). The district court assumed that Philippine law governed this action (*id.* at 53a-54a) and, after reviewing the parties' conflicting affidavits concerning the law of that country, "conclude[d] that under Philippine law Citibank's worldwide assets are available for satisfaction of plaintiff's claim" (*id.* at 59a).

Citibank appealed, and the court of appeals issued an unpublished order remanding the case for clarification of certain matters. Pet. App. 49a-51a. Specifically, the court of appeals ordered the district court to make supplemental findings of fact and conclusions of law as to several questions, including whether the parties agreed as to where the debt could be repaid, and what law applies in the absence of controlling Philippine law. *Id.* at 50a. On remand, the district court answered those questions and adhered to its previous judgment. *Id.* at 36a-48a.

In response to the first question, the district court concluded, based on remittance instructions contained in the Citibank/Manila and WFAL telex confirmations, that the parties had "agree[d] that repayment was to occur in New York." Pet. App. 40a. It distinguished, however, "repayment" from "collection" and concluded that the parties had reached no agreement as to where the debt

was collectible. *Id.* at 41a.[6] In answer to the second question, the district court decided that New York law, rather than Philippine law, was controlling. *Id.* at 44a.[7]

The district court ruled that New York law required Citibank to make a good faith effort "to seek the [Philippine] government's consent to use the assets booked at Citibank's non-Philippine offices." Pet. App. 47a. It found that Citibank had failed to make that effort. *Ibid.*; see also *id.* at 61a. The district court accordingly concluded that "Citibank is liable for the debt of its Manila branch and [WFAL] is entitled to look to Citibank's worldwide assets for satisfaction of its deposits." *Id.* at 47a.

Citibank renewed its appeal, and the court of appeals affirmed the district court's judgment, but on a different rationale. Pet. App. 27a-34a. Citing general banking law principles, the court of appeals concluded that ordinarily a party who makes a deposit with a foreign branch may demand repayment only at that branch. *Id.* at 31a-32a. The court also recognized, however, that the party may alter that "normal limitation" through agreement with the bank. *Id.* at 32a-33a. Applying those principles, the court concluded that Citibank and WFAL had reached such an agreement and that WFAL was "entitled to col-

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[6] The district court's terminology has introduced confusion into the case. The court used the term "place of repayment" to describe what is known in banking law as the place of remittance of funds; it used the term "place of collection" to describe what is known in banking law as the place where the account is payable. Compare *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1124-1125 (5th Cir. 1985), with Pet. App. 38a. See also *id.* at 22a.

[7] The court reasoned that to maintain New York's "preeminent financial position, it is important that the justified expectations of the parties to the contract be protected" and that "these expectations will be best promoted by applying a uniform rule of New York law where, as here, the transactions were denominated in United States dollars and settled through the parties' New York correspondent banks, and where the defendant is a United States bank with headquarters in New York." Pet. App. 44a.

lect the deposits out of Citibank assets in New York." *Id.* at 33a-34a.

This Court vacated the court of appeals' judgment and remanded the case for further proceedings. Pet. App. 12a-26a. The Court concluded that the court of appeals had based its ruling on the mistaken factual premise that Citibank and WFAL had agreed to permit collection of the deposits from Citibank's New York assets. *Id.* at 18a-20a. This Court explained that the district court had expressly determined that the parties had not reached agreement on the place of "collection," *id.* at 21a, that the district court's determination was not "clearly erroneous," *id.* at 21a-23a, and that, given the district court's findings, "the question becomes whether collection is permitted nonetheless by rights and duties implied by law," *id.* at 23a.

This Court observed that WFAL attempted to defend the court of appeals' judgment "under principles of either New York or Philippine law." Pet. App. 23a. The Court found it "unclear" what law the court of appeals found to be controlling. *Id.* at 23a-24a. It noted that although WFAL contended that the court of appeals' opinion relied on New York law, "[w]e do not think that this is a fair or necessary construction of the opinion." *Id.* at 24a. This Court accordingly remanded the case for the court of appeals "to determine which law applies and the content of that law." *Ibid.* It added that if the court of appeals "is of the view that the controlling rule is supplied by Philippine law or, as Citibank would have it, by a federal common law rule respecting bank deposits, it should make that determination, subject to any further review [this Court] deem[s] appropriate." *Ibid.*

On remand, the court of appeals affirmed the district court's previous decision that New York law governs WFAL's claim and that, under New York law, Citibank was not excused from repaying the deposits. Pet. App. 1a-11a. The court of appeals quoted at length from the district court's choice of law analysis and endorsed its reasoning that New York law should be applied to main-

tain New York's "preeminent financial position" and to protect the "justified expectations of the parties to the contract." *Id.* at 6a-8a, 9a. See note 7, *supra*. The court of appeals flatly rejected Citibank's assertion (which the United States supported as amicus curiae) that federal law governed the question whether Citibank is obligated to use its home office assets to repay foreign branch deposits. *Id.* at 9a-10a.

Applying New York law, the court of appeals endorsed the district court's conclusion that Citibank was obligated to repay the deposits, because Citibank "had not satisfied its good faith obligation to seek the [Philippine] government's consent to use the assets booked at Citibank's *non-Philippine* offices." Pet. App. 9a (emphasis added). The court of appeals further stated:

> We conclude that under New York law, unless the parties agree to the contrary, a creditor may collect a debt at a place where the parties have agreed that it is repayable. In applying this principle to the circumstances of the present case to affirm the judgment in favor of WFAL, we do not assume the existence of an agreement between Citibank/Manila and WFAL to permit collection in New York; rather, in light of the express finding of the district court that the parties had no agreement as to permissible situses of collection, we rely on the absence of any agreement forbidding the collection in New York.

Id. at 10a.[8]

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[8] The court of appeals also noted that WFAL had submitted evidence at the appellate stage showing that the Philippine government had allowed Citibank to remit profits from its Manila branch to Citibank's home office. Pet. App. 10a-11a. The court of appeals found it unnecessary to resolve whether WFAL was entitled to repayment from the remitted profits, but suggested that the evidence "appears to support the district court's finding, if further support were needed, that Citibank in fact did not satisfy its good faith obligation to seek that government's approval of repayment of WFAL's deposits to WFAL." *Id.* at 11a.

DISCUSSION

Citibank seeks resolution of a fundamental question concerning international banking operations—whether a U.S. bank may be held liable for deposits placed with a branch in a foreign country when the foreign government prevents the branch from repaying those deposits. This Court's previous decision in this case corrected the court of appeals' mistaken understanding of the district court's ruling and remanded this case for resolution of the pertinent legal questions. The court of appeals has now addressed those questions and resolved them erroneously. This Court should grant the petition for a writ of certiorari, correct those errors, and clarify the governing principles in this important area of law.

1. This case raises legal issues of great commercial and regulatory consequence. Congress has authorized creation of foreign branches to perform functions in furtherance of "foreign commerce" and "as fiscal agents of the United States." 12 U.S.C. 601. As Citibank recites, U.S. banks currently have more than 800 foreign branches in 71 different countries with outstanding deposit obligations of approximately $300 billion. Pet. 2. History has demonstrated that those branches, located on foreign soil, are subject to the vagaries of foreign law. During periods of political or economic instability, foreign governments frequently prevent such branches from repaying depositors, through expropriation of assets or through government enforced limitations on repayment.[9]

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[9] See, *e.g.*, *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985) (Mexican repayment restrictions); *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir.) (Costa Rican repayment restrictions), cert. dismissed, 473 U.S. 934 (1985); *Garcia* v. *Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984) (Cuban expropriation); *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981) (Vietnamese expropriation), cert. denied, 459 U.S. 976 (1982); *Tillman* v. *National City Bank*, 118 F.2d 631 (2d Cir.) (Soviet Union expropriation), cert. denied, 314 U.S. 650 (1941).

The question whether a U.S. bank may be held liable for deposits placed with its foreign branches in those circumstances is a matter of obvious importance to the banking and financial services community. If a U.S. bank's home office is liable when a foreign government encumbers the bank's foreign branch deposits, then that bank will be subject to new and unforeseeable liabilities arising from the unpredictable actions of foreign governments. The matter is no less important to the federal bank regulatory agencies, which regulate banking operations and insure deposits based, in part, on the institutions' potential liabilities. As this Court's previous decision in this case has recognized, it is also a matter that has generated controversy and confusion in the financial services community and among the courts. Pet. App. 22a-23a, 24a.[10]

The Court's prior decision has focused the inquiry. As the Court recognized, parties to a banking transaction

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[10] The Court observed that "[a] fair reading of all of the testimony supports the conclusion that, at least in this trial, on the issue of the allocation of sovereign risk there was a wide variance of opinion in the international banking community." Pet. App. 23a. The Court also noted that the court of appeals' previous holding in *Garcia, supra*, that a home office is liable for expropriated foreign branch deposits, conflicts with the New York Court of Appeals' decision in *Perez* v. *Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y.), cert. denied, 469 U.S. 966 (1984). "In that case, the New York Court of Appeals was explicit in pointing out that its decision was in conflict with that reached two days earlier by the Second Circuit in *Garcia, supra*, a case that the *Perez* court deemed 'similar on its facts.'" Pet. App. 24a. Commentators have noted the confused state of the law in this area. See, *e.g.*, Smedresman & Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. Rev. 733 (1989). Additionally, Citibank's current petition for a writ of certiorari presents the fourth instance in which this Court has invited the United States to address the matter. See Brief of the United States as Amicus Curiae in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, cert. granted, 493 U.S. 990 (1989), and decision vacated, 495 U.S. 660 (1990); Brief of the United States as Amicus Curiae in *Citibank, N.A.* v. *Trinh*, cert. denied, 496 U.S. 912 (1990); Brief of the United States as Amicus Curiae in *Chase Manhattan Bank, N.A.* v. *Vishipco Line*, cert. denied, 459 U.S. 976 (1982).

can, in many cases, resolve the question of home office liability by agreement. Pet. App. 19a. The interbank Eurodollar market, however, does not operate on the basis of such agreements. In Eurodollar transactions, like the deposits here, financial institutions transfer large sums of money throughout the world, virtually instantaneously, based on terse oral agreements among money managers and brokers respecting interest rates and maturity dates. This fast-paced international market, which operates much like a securities or commodities exchange, does not provide for negotiated agreements to resolve contingencies, such as collection of foreign branch deposits in the event of foreign sovereign interference. As the Court recognized, when the parties have failed to resolve such matters by agreement, the appropriate legal system—either federal, state, or foreign—will provide the governing rule. *Ibid.*

This Court concluded that "there was no agreement between the parties respecting collection from Citibank's general assets in New York" and that "the question becomes whether collection is permitted nonetheless by rights and duties implied by law." Pet. App. 23a. The Court remanded the case to the court of appeals specifically "to determine which law applies, and the content of that law," subject to "any further review we deem appropriate." *Id.* at 24a. Thus, the Court charged the court of appeals with responsibility to determine what law should govern a U.S. bank's obligation to repay foreign branch deposits when the parties have reached no agreement on the subject. In response, the court of appeals issued a cursory decision that, as we explain below, has simply added to the longstanding confusion among the courts.

2. In determining "which law applies," the court of appeals endorsed the district court's conclusion that a uniform rule of New York law governs the transactions at issue here, because such a rule is necessary to maintain New York's "preeminent financial position" by protecting the "justified expectations of the parties to the

contract." Pet. App. 7a. This is a remarkable approach. It is both unusual and parochial to select the applicable law based on preservation of the "financial position" of a particular financial center. Curiously, the courts cited no evidence as to the actual expectations of the parties concerning what law would control. The district court had cited other factors, noting that (1) the transactions are denominated in dollars; (2) the funds are remitted through New York banks; (3) Citibank's headquarters are in New York; and (4) a need exists for a uniform rule. Pet. App. 7a, 44a. But those factors are by no means the only pertinent considerations. And, for its part, the court of appeals engaged in no independent analysis of the choice of law issue. Its resolution of that issue is, at a minimum, inadequate.

Assuming *arguendo* that New York law applies, the court of appeals' determination of the "content of that law" is plainly flawed. The court of appeals concluded that New York law required Citibank to use its home office assets to repay the Citibank/Manila deposits because "Citibank 'had not satisfied its good faith obligation to seek the [Philippine] government's consent to use the assets booked at Citibank's non-Philippine offices,' " viz., assets booked at its *home office*. Pet. App. 9a.[11] There is no reason in law or logic, however, why Citibank should be held liable for failure to seek the Philippine government's permission to use its New York assets to repay

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[11] The district court had specifically stated:

> It is not disputed that Citibank sought but did not obtain approval for its Manila branch to use its Philippine (or local) assets toward repayment of the Deposits. It is further undisputed that Citibank applied for and did receive Central Bank permission for its Manila branch to repay foreign depositors to the extent of the non-Philippine assets carried on the books of that branch. This approval resulted in the partial repayment of $934,000. However, no permission was ever sought to use the third category of assets here at issue, namely, assets booked at Citibank's offices outside the Philippines.

Pet. App. 47a; see also *id.* at 61a.

the Citibank/Manila deposits, particularly when Citibank has consistently argued that it is under no legal obligation to use those assets to repay those deposits.[12]

The court of appeals' additional rationale—that Citibank is liable to repay the Citibank/Manila deposits from its New York assets in "the absence of any agreement forbidding the collection in New York" (Pet. App. 10a)—is a startling and unexplained departure from its previous decision. As this Court observed in reviewing that decision, the court of appeals recognized the "general banking law principle" that "in the ordinary course, a party who makes a deposit with a foreign branch of a bank can demand payment of the deposit only at that branch." *Id.* at 18a; see *id.* at 32a. The court of appeals' latest decision rejects the settled banking law principle that the court itself had previously cited, and its decision also exacerbates the existing conflict between the court of appeals' decision in *Garcia* and the New York Court of Appeals' decision in *Perez*. See Pet. App. 24a.[13]

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[12] WFAL makes much of the fact that the Philippine government debt restructuring agreements have allowed Citibank/Manila to remit profits to its home office, while keeping in place the restrictions on repayment of dollar-denominated deposits. See Br. in Opp. 4, 6, 9, 26-27. The question, however, is not whether the Philippine government's restrictions are fair, but rather whether they are binding on the deposit transaction at issue here.

[13] The court of appeals' decision is also in tension with numerous other New York decisions. See, *e.g.*, *Dougherty* v. *Equitable Life Assurance Society*, 193 N.E. 897 (N.Y. 1934) (life insurance company); *Trujillo-M* v. *Bank of Nova Scotia*, 273 N.Y.S.2d 700 (Sup. Ct. 1966), aff'd. 289 N.Y.S.2d 389 (App. Div.), cert. denied, 393 U.S. 982 (1968); *Dougherty* v. *National City Bank*, 285 N.Y.S. 491 (Sup. Ct. 1935); see also *Tillman* v. *National City Bank*, 118 F.2d 631 (2d Cir.), cert. denied, 314 U.S. 650 (1941). Indeed, the court of appeals has transformed what was once a troubling exception to a general principle, see, *e.g.*, *Trinh* v. *Citibank, N.A.*, 850 F.2d 1164, 1168 (6th Cir. 1988) ("the bank is surely correct in arguing that absent special circumstances, deposits made payable in branch banks are payable only there"), cert. denied, 496 U.S. 912 (1990), into an expansive new rule.

3. This Court's review is needed to correct the court of appeals' flawed decision; to close the widening gulf between that court and the New York Court of Appeals on the issue; and to clarify the legal principles that govern this important area of law. The court of appeals' decision applies principles that are inconsistent with established legal rules governing international banking transactions. If the court of appeals' decision is left uncorrected, the United States will be required to make fundamental adjustments in its federal bank regulatory programs, including regulations governing reserve requirements and deposit insurance.

The initial question is what legal system should determine a U.S. bank's liability for its foreign branch deposits. The courts below correctly recognized that it is proper to use federal choice of law principles to answer that question. Pet. App. 6a-7a. WFAL invoked the district court's jurisdiction based, in part, on Section 25 of the Federal Reserve Act, as amended (the Edge Act), which confers original jurisdiction on the court over suits "arising out of transactions involving international or foreign banking." 12 U.S.C. 632. See Pet. App. 43a. Because Congress has directed that such disputes shall be heard in a federal forum, federal law should provide the relevant choice of law rules.[14]

The Second Restatement of Law (Conflicts), which both federal and New York courts have cited approvingly, articulates the appropriate federal choice of law rule:

> The validity of a contract for the payment of money lent and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that repayment be made, unless, with

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[14] See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-497 (1941); *Aaron Ferer & Sons Ltd.* v. *Chase Manhattan Bank, N.A.*, 731 F.2d 112, 120-121 (2d Cir. 1984); *Corporacion Venezolana de Fomento* v. *Vintero Sales Corp.*, 629 F.2d 786, 794-795 (2d Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Pet. App. 6a.

> respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 [of the Restatement].

1 Restatement (Second) of Conflict of Laws § 195 (1971).[15] The Restatement's reference to the place of repayment plainly refers to where the account is legally payable—"collectible" in the parlance of the district court—and not merely where the funds might be remitted for the convenience of the depositor. See *Callejo* v. *Bancomer S.A.*, 764 F.2d 1101, 1124 (5th Cir. 1985).

Although Citibank and WFAL reached no specific agreement as to whether WFAL could collect the deposits in New York, the parties have not disagreed that, in the absence of the Philippine government's restrictions, WFAL could obtain repayment of the deposits at Citibank/Manila, the branch where it deposited the funds. As the Restatement commentary explains:

> Money lent by a bank or deposited in a bank is usually repayable at the bank itself or, when the bank has branches, at the branch with which the customer dealt. In the absence of an effective choice of law by the parties, the state of the applicable law in such instances will almost invariably be the state where the bank, or the particular branch thereof, is located.

Id. § 195 cmt. d. Thus, under Restatement principles, the law of the Philippines—which controls "the branch with which the customer dealt"—governs the deposit relationship "unless, with respect to the particular issue, some

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[15] Section 6 identifies the following factors: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. 1 Restatement (Second) of Conflicts of Laws § 6 (1971).

other state has a more significant relationship." The relevant Philippine law includes MAAB 47, which restricts repayment of the Citibank/Manila deposits.[16]

Although the Restatement formulation indicates that Philippine law generally governs the Citibank/Manila deposits, it does not dictate that Philippine law should govern the "particular issue" here—whether Citibank's home office must repay the restricted Citibank/Manila deposits when the parties have reached no agreement on the matter. The United States has by far the most "significant relationship" to the issue. The United States charters and pervasively regulates U.S. banks, and it has a uniquely federal interest in and control over their foreign branch operations. See, *e.g.*, 12 U.S.C. 601 *et seq.* (authorizing the establishment of foreign branches). The United States' interest is particularly strong with respect to the issue of a U.S. bank's home office liability for expropriated or restricted foreign branch deposits, because expropriations and restrictions are frequently the consequence of foreign turmoil and may have foreign relations consequences. Additionally, such foreign actions can affect the United States' programs for insuring deposits and regulating the safety and soundness of U.S. banking operations. Thus, a compelling basis exists for applying a federal rule of law to govern whether a U.S. bank's home office is liable for expropriated or restricted foreign branch deposits when it has not expressly assumed that obligation.[17]

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[16] The Senior Deputy Governor of the Central Bank of the Philippines has described the controlling Philippine law as follows:

> Unless the deposit contract otherwise specifies, deposits placed with the Manila branch of Citibank are payable at that branch. The branch, and its obligations, are subject to regulations of the Central Bank, including MAAB 47.

Citibank C.A. Br. Add. A (Nov. 16, 1987).

[17] Cf. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504 (1988); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426-427 (1964); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367

The rationale for determining a U.S. bank's home office liability based on federal law is especially powerful, because the United States has addressed the issue through its statutes and regulations and the way in which it administers its bank regulatory programs. As we explained, pp. 2-4, *supra*, Congress and the Federal Reserve Board—to preserve the competitiveness of U.S. banking interests overseas—have specifically exempted deposits that are payable only abroad from certain requirements applicable to deposits payable in this country, such as reserve requirements and federal deposit insurance assessments. See 12 U.S.C. 461(b)(6); 12 U.S.C. 1813(*l*)(5)(A); 12 C.F.R. 204.1(c)(5) and 204.128. In promulgating and implementing those exemptions, the federal banking agencies faced the same question presented here: whether in the absence of an agreement, foreign branch deposits are subject, as a matter of law, to payment (*i.e.*, "collection") in this country. The agencies have adopted and long employed a rule that, unless the parties agree otherwise, a foreign branch deposit is payable only abroad.[18]

(1943); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 457-458 (1942).

[18] For example, the Federal Reserve Board's regulations state that reserve requirements "do not apply to any deposit that is payable only at an office outside of the United States." 12 C.F.R. 204.1(c)(5). The regulations recognize, however, that this exemption is not available if the bank agrees to repay the deposit in the United States. 12 C.F.R. 204.128. The regulations explain:

> A customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals. *When payment of a deposit in a foreign branch is guaranteed by a promise of payment at an office in the United States if not paid at the foreign office, the depositor no longer assumes this risk* but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the depository institution.

12 C.F.R. 204.128(c) (emphasis added). See generally Logan & Kantor, *Deposits at Expropriated Branches of U.S. Banks*, 1982

The United States' incorporation of that simple, clear, and uniform rule into the federal regulatory scheme establishes a federal policy concerning the relationship between U.S. banks and their foreign branch depositors that should control this case: the United States banking system and its constituent banks are not responsible for foreign sovereign action that affects the ability of a foreign branch to repay deposits placed in that branch, unless the depositor enters into a contrary agreement with the bank. The federal rule, derived from the common law, is consistent with widely accepted general banking law principles.[19] That rule is easy to apply, and it serves an important practical function in facilitating administration of the federal deposit insurance program and simplifying federal bank examinations. In addition, it is consistent with laws of other jurisdictions.[20] Indeed, the

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U. Ill. L. Rev. 333, 335-336. The court of appeals mistakenly suggested that a different federal regulation, 12 C.F.R. 204.2(t), rendered deposits payable in the United States *unless* the deposit agreement expressly made them exclusively payable abroad. Pet. App. 10a. As Citibank correctly explains, Pet. 15-17, the court misread that regulation, which simply clarifies that foreign branch deposits by United States residents in amounts less than $100,000 are not entitled to the reserve exemption. See Pet. App. 90a-94a.

[19] See, *e.g.*, *United States* v. *First Nat'l City Bank*, 321 F.2d 14, 19-22 (1963), aff'd en banc, 325 F.2d 1020 (2d Cir. 1964), rev'd on other grounds, 379 U.S. 378 (1965). The common law courts developed the principle partly in response to the perceived "impracticality of requiring constant transmission of reports on the status of accounts in one branch to all other branches." *First Nat'l City Bank*, 321 F.2d at 22. The more enduring justification in the age of modern telecommunications rests, however, "on the complications that arise out of the fact that different branches may be subject to the laws of other countries and may be dealing in different currencies." *Ibid.*

[20] See, *e.g.*, *Joachimson* v. *Swiss Bank Corp.*, [1921] 3 K.B. 110, 127 ("promise to repay is to repay at the branch of the bank where the account is kept"); *Dame Ba Tu Thu Van* v. *Banque National de Paris*, Tribunal de grande instance de Paris, 9éme Chambre (Mar. 8, 1985), *reported in* Recueil Dalloz Sirey 500-501 (1985). See also Smedresman & Lowenfeld, *supra*, 64 N.Y.U. L. Rev. at 782-783 (discussing French cases and commentary).

same result would obtain under a proper application of Philippine or New York law.[21]

We submit that the court of appeals erred both in its determination of applicable law and its analysis of the content of that law. A federal rule should control the issue in this case. Under that rule, a U.S. bank should not be held liable to repay an expropriated or restricted foreign branch deposit from its home office assets unless the parties have specifically agreed to such repayment. There is a genuine need for this Court to clarify this important point of law.[22]

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[21] The Senior Deputy Governor of the Central Bank of the Philippines described the analogous Philippine rule as follows:

> Both MAAB 47 and the Standstill Telex suspended temporarily the payment of foreign currency obligations due to foreign banks and financial institutions, except to the extent the Central Bank authorized repayment. Under such circumstances, there is no obligation imposed under Philippine law on a foreign bank to remit funds to its Philippine branch to pay deposits whose payment has otherwise been temporarily suspended as aforesaid stated. Nor is there an obligation imposed under Philippine law that the foreign bank pay the Philippine branch deposits in those circumstances at branches outside of the Philippines.

See Citibank C.A. Br. Add. A (Nov. 16, 1987). New York law, properly applied, produces the same result. See cases cited at note 13, *supra*.

[22] Citibank has advised us that recent changes in the Philippine government's foreign exchange resources and policies raise the possibility that the Philippine government may authorize early repayment of the Citibank/Manila deposits, but it is unclear at this time what action, if any, the Philippine government may take. In the event that the Philippine government allows Citibank/Manila to repay WFAL, the issues in this case would become moot. Given the importance of the issue, in the event of mootness, the petition for a writ of certiorari should be granted, the court of appeals' decision should be vacated, and the case should be remanded for dismissal. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 91-689

In The

Supreme Court of the United States

October Term, 1991

CITIBANK, N.A.,

Petitioner,

vs.

WELLS FARGO ASIA LIMITED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Pursuant to Rule 15.7, respondent briefly addresses certain of the positions taken by the United States in its brief dated June 1992. The United States urges this Court to go to the extreme length of creating federal common law, and displacing non-conflicting state law, in an area where Congress itself has expressly declined to legislate. In addition, as demonstrated below, the issue raised by the United States has been mooted. The case remains non-certworthy.

ON THIS RECORD THERE IS NO OCCASION TO CREATE FEDERAL COMMON LAW

The United States and Citibank seek the creation of federal common law where none exists even if that means trampling upon the contractual rights of the parties and the sovereign right of the State of New York to declare what law governs the relationship between the depositor, WFAL, and Citibank, a national bank headquartered in New York and subject to its jurisdiction. This Court has been reluctant in the past to serve as a vehicle for litigants desirous of changing laws when they have been unsuccessful before Congress and the proper administrative agencies. *See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), where this Court reasoned:

> The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business

> of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Id. at 647 (citation omitted).

Nowhere in the brief of the United States is it explained why it is necessary or appropriate for the judicial branch to create the proposed law, given our separation of powers. Nowhere is it explained why this Court should make new law when a bill to do exactly what is proposed here was considered and rejected as part of the Federal Deposit Insurance Corporation Improvement Act of 1991 enacted on November 26, 1992.[1] Nor is it explained why this Court should change the law *retroactively* when the bills proposed in Congress by the same regulatory agencies have suggested change *prospectively*. Nor is it explained why this Court should change the law *retroactively* at the behest of the federal regulatory agencies when they have known of this banking dispute since 1984 and have adopted no rules or regulations addressing the issue they now say is of paramount importance. Finally, nowhere does the United States say why this Court should grant certiorari *for a second time* when the case involves only "factual determinations" and the opinion of the Court of Appeals "decides no novel or undecided question of federal law" as previously

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[1] Senate bill S.543 § 1131 failed and similar legislation is being proposed this term.

observed by the Chief Justice. App. 25a and Transcript of Oral Argument, No. 88-1260 (March 1990) 4-5.

THE ISSUE RAISED BY THIS APPEAL HAS BECOME MOOT

The United States misstates the question presented. The United States and Petitioner continue to rely upon the premise, rejected by both courts below, that the Philippine government *prevented* the Manila branch from repaying WFAL's deposits.

The issue which Citibank and the United States raise has been mooted by Citibank's successful application to the Philippine Central Bank to repatriate profits of over $160 million from its Manila branch. Until the fall of 1990, everyone, including this Court, accepted Citibank's representation that the assets of the Manila branch were "blocked" by the Philippine decree. But the situation changed dramatically when it was discovered that Citibank had been withdrawing U.S. dollars from that country as earnings. The discovery of this debacle was made following this Court's opinion at 495 U.S. 660 (1990). It should put this matter to rest. Citibank has lost because it failed to establish its impossibility defense, not because the lower courts have created some new "home office" rule.[2]

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[2] Since the applicable decree permits repayment with "prior approval," permission to repay must be sought in order to sustain a defense of impossibility. This is hornbook law. *E.g.*, 18 Williston, Contracts (3d ed. 1978), text before and n. 3, 4 at 273.

The United States dismisses these important developments with the back of its hand, failing to meet the real issue – that Citibank failed to seek permission to repay with branch assets.[3] See U.S. Br. at 14 n. 12. Rather, Citibank breached its obligation of good faith and fair dealing when it refused to seek permission to repay its creditors and yet later obtained permission to remit earnings to itself. Thus, it is Citibank's *failure to ask*, not the Central Bank's decree that has defeated Citibank's defense of impossibility.

The issue of law that Citibank and the United States are determined to have this Court resolve is not presented. On this record, there is no occasion for this Court to address the issue of whether the *home office* of a United States bank is liable for repayment of deposits when branch assets are "blocked" by a foreign government, for Citibank never fulfilled its obligation to test whether these assets were in fact blocked. Since this Court does not sit to render advisory opinions, the petition should be denied.

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[3] The United States incorrectly characterizes WFAL's position as one of dissatisfaction with the Philippine government's restrictions. But, the Philippine government has adopted two decrees, one requiring Philippine branches to obtain permission before repaying certain deposits (MAAB No. 47) and the other requiring them to obtain permission before remitting earnings to their home offices (Section 49 of Central Bank Circular No. 1028). WFAL is not expressing dissatisfaction with the foregoing or with the administration of the decrees by the Philippine Central Bank. Indeed, the latter has granted permission to repay branch deposits when to do so would not adversely affect the country's objective of conserving scarce foreign exchange. J.A. 91-92; J.A. 95-97.

THERE IS NO CONFLICT BETWEEN STATE AND FEDERAL LAW

The United States has incorrectly characterized the Court's holding. The United States claims that the Court of Appeals held that Citibank must repay WFAL with New York assets *because* it did not seek consent to use those assets. U.S. Br. at 13-14. As noted in WFAL's Brief in Opposition, the decision by the Court of Appeals is both sound and fully supported by precedent. The Second Circuit concluded that New York law required Citibank to use its home office assets *because,*

> [T]he district court noted that the most recent pronouncement of the New York Court of Appeals, *see Perez v. Chase Manhattan National Bank, N.A.* . . . indicated that the parent bank is ultimately liable for the obligations of the foreign branch. Pet. App. 8a.

The Court of Appeals specifically left undecided whether a New York court would hold a bank liable if it sought and was denied permission to use home office assets to repay because Citibank "had not satisfied its good faith obligation to seek the [Philippine] government's consent to use the assets booked at Citibank's non-Philippine offices." Pet. App. 9a.

In urging this Court to displace state law with federal common law regulating deposit contracts, the United States misapplies the portions of the federal banking regulatory scheme it cites. There is an important difference between: (i) a regulation which prescribes where deposits are to be repaid in the absence of an agreement between the parties; and (ii) one which does not prescribe

where deposits are payable, but instead specifies consequences, such as reserve and deposit insurance requirements, if the parties have selected a particular place of payment.

The United States and Citibank repeatedly confuse these two concepts. They invoke statutes and regulations, such as 12 U.S.C. 461(b)(6); 12 U.S.C. 1813(*l*)(5)(A); 12 C.F.R. 204.1(c)(5); and 12 C.F.R. 204.128, for the proposition that "[t]he agencies have adopted and long employed a rule that, unless the parties agree otherwise, a foreign branch deposit is payable only abroad." U.S Br. at 18. The regulations and statutes cited do not support this proposition. They are silent about where deposits are payable absent an agreement; rather, they govern the reserve and insurance consequences of deposits on the basis of the parties' *agreement*. The statutes and regulations leave it open to the parties to allocate sovereign risk.

Moreover, the United States asserts that this supposed regulatory scheme "establishes a federal policy . . . consistent with widely accepted general banking law principles" allocating sovereign risk to the depositor absent a contrary agreement.[4] U.S. Br. at 19. This

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[4] Neither the United States nor Citibank cite a single case that has excused a bank's refusal to repay a deposit under the circumstances presented here, i.e., when a government decree encumbered a branch's assets, but does not encumber the branch's deposits. Rather, the United States cites a technologically obsolete case dealing with attachments. *United States v. First National City Bank*, 321 F.2d 14 (2d Cir. 1963), *aff'd en banc*,

(Continued on following page)

assertion flatly contradicts the government's observation that there is "wide variance of opinion in the international banking community" regarding "the issue of the allocation of sovereign risk." U.S. Br. at 11, n. 10 and text. The United States also ignores the trial court's uncontested finding of fact that there is no custom and practice to this effect. Pet. 53a, 59a.

Finally, contrary to the position asserted by the United States at 19 n. 18, the Court of Appeals correctly held that there is no conflict between state law and the federal statutes and regulations governing offshore deposits. Pet. 9a-10a. The Court cited and relied upon 12 C.F.R. 204.2(t), which defines a deposit that is "payable only outside the United States" as "a deposit . . . as to which the depositor is entitled, *under the agreement with the institution*, to demand payment *only* outside the United States." (Emphasis the court's). From this the Court of Appeals concluded:

> The provisions relied upon thus do not reveal a policy of allocating the risk to depositors as a matter of law where there is no such agreement. So long as state law does not restrict a bank's freedom to enter into an agreement that allocates the risk of foreign sovereign restrictions,

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(Continued from previous page)

325 F.2d 1020 (1964), *rev'd*, 379 U.S. 378 (1965). In contrast, the New York courts have specifically held the bank to be liable under these circumstances. *Sokoloff v. National City Bank of New York*, 239 N.Y. 158, 145 N.E. 917 (1924). *See also, Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988), *cert denied*, ___ U.S. ___, 110 S.Ct. 2602 (1991).

> state law does not conflict with the federal policy reflected in current statutes or regulations. We see no such restriction in the law of New York and hence there is no " 'significant conflict' ". . . . Pet. 10a.

The United States attacks this holding by arguing that " . . . the court misread that regulation, which simply clarifies that foreign branch deposits by United States residents in amounts less than $100,000 are not entitled to the reserve exemption."[5] U.S Br., n. 18 at 18-19. This is not correct. The United States simply has it backwards. While the language it focuses upon does not apply to small deposits by U.S. residents, it does apply to all other deposits by residents and non-residents alike. Consequently, as the Court held, there is no conflict, much less a "significant" one, between federal law or policy and state law. *See* WFAL Opp. at 19-20.

MUNSINGWEAR DOES NOT APPLY

Contrary to the suggestion of the United States, U.S. Br. at 20 n. 22, this case may not be appropriate for *vacatur* under the rule enunciated in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), if Citibank belatedly repays the principal amount of the deposits. As that case demonstrates, application of the *Munsingwear* doctrine turns upon the circumstances under which a case terminates. Respondent suggests that no decision concerning that question be made until all of the facts are known.

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[5] The regulation is set forth in WFAL's Opposition at 18 and at App. 87a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 91-689

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Supreme Court of the United States

OCTOBER TERM, 1991

CITIBANK, N.A.,

Petitioner,

v.

WELLS FARGO ASIA LIMITED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 15.7 IN RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 15.7 IN RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

Pursuant to Rule 15.7 of the Rules of this Court, Petitioner, Citibank, N.A. ("Citibank"), files this brief in response to the Brief for Respondent in Opposition to the Brief for the United States as *Amicus Curiae* (filed June 5, 1992) ("Supp. Br.").

On June 1, 1992, the Solicitor General, on behalf of the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, and the Departments of State and the Treasury, filed a brief urging the Court to grant Citibank's petition for certiorari and reverse the judgment of the court of appeals. In his brief, the Solicitor General stated that this case "raises

legal issues of great commercial and regulatory consequence," [1] and concluded:

> We submit that the court of appeals erred both in its determination of applicable law and its analysis of the content of that law. A federal rule should control the issue in this case. Under that rule, a U.S. bank should not be held liable to repay an expropriated or restricted foreign branch deposit from its home office assets unless the parties have specifically agreed to such repayment. There is a genuine need for this Court to clarify this important point of law.

U.S. Br. at 20. *See also id.* at 10.

Although Respondent's supplemental brief purports to respond to the Solicitor General's brief, it offers no response at all; as before, Respondent completely ignores the importance of this case to the United States and the international financial community, and its argument on the merits depends on the assertion that the federal banking agencies do not understand the legal framework they are charged with administering. In sum, the supplemental brief restates the tired arguments made in the Brief for Respondent in Opposition (filed Dec. 13, 1991) to which replies already have been made. Accordingly, for the Court's convenience, we here refer to the pages of previous submissions that disposed of these contentions.

1. Respondent again argues that the Court need not reach the legal issue that the Solicitor General stated is of great consequence, because Citibank's Manila branch ("Citibank/Manila") never requested permission to repay Respondent's deposits, and, therefore, as the argument goes, it could have repaid the deposits all along. (Supp.

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[1] Brief for the United States as *Amicus Curiae* at 10 (filed June 1, 1992) ("U.S. Br."). *See also* U.S. Br. at 11, 15, 20 (noting importance of issue presented); Petition for a Writ of Certiorari at 10-11, 19-23, 25-26 (filed Oct. 24, 1991) ("Pet.") (same); Reply Brief of Petitioner at 1-3 (filed Dec. 23, 1991) ("Reply Br.") (same and noting Respondent's failure to address importance of case).

Br. at 3-4.) Every decision in this case has found that Citibank/Manila has been prevented by Philippine law from repaying the principal of Respondent's deposits with its assets, and Respondent's argument that Citibank/Manila did not adequately seek permission to repay Respondent conflicts with the undisturbed findings below. (Reply Br. at 6-7.)[2] Respondent also still appears to be of the view that it should prevail because Citibank's home office did not request Philippine government permission to repay Respondent out of its assets. However, whether Citibank's home office could repay Respondent (with or without Philippine government approval) is irrelevant and simply begs the dispositive question framed by this Court (*see* Pet. App. B. at 19a) of whether Citibank's home office is *obligated* by applicable law to do so. (Pet. at 19 n.30; Reply Br. at 6-7.)

2. Respondent again argues that there is no pertinent federal law applicable to this case, and, alternatively, there is no conflict between federal and state law (as interpreted by the court of appeals). (Supp. Br. at 1-2, 5-8.) The content and applicability of federal law (and its conflict with the court of appeals' version of New York law) are set forth in full in Citibank's previous submissions. (Pet. at 11-19, 23-26; Reply Br. at 3-6.) The banking agencies have interpreted their rules in accordance with those principles of federal law. And, the Solicitor General has advised the Court, as he advised the court below, that the "federal rule" advocated in the Petition "should control the issue in this case," (U.S. Br. at 20), and that there is "a compelling basis . . . for applying [this] rule." *Id.* at 17. *See also id.* at 2-4, 18-20 (discussing source and content of applicable federal rule).

3. Respondent again alludes to the fact that one of the hundreds of proposed provisions that did not end up in

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[2] Respondent's repeated contention (Supp. Br. at 3-4) that Citibank/Manila's ability to remit profits was, under Philippine law, interchangeable with its ability to repay Respondent is wrong. (Reply Br. at 7-8.)

last year's banking legislation addressed the issue of allocation of sovereign risk. (Supp. Br. at 2.) The fact that Congress failed to enact this provision is of no legal significance. (Reply Br. at 8.)

CONCLUSION

Accordingly, the Court, as urged by the Solicitor General, the Petitioner, and *amici* representing the international banking community, should grant Citibank's petition.

Respectfully submitted,

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